No. 14618

United States
Court of Appeals
for the Ninth Circuit.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

BEKINS VAN & STORAGE COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-4-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Southern District of California, Central Division

File No. 16,256-C.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

BEKINS VAN & STORAGE COMPANY, a Corporation,

Defendant.

COMPLAINT
(Fair Labor Standards Act)

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by Act of October 26, 1949, 63 Stat. 910, U.S.C., Title 29, Section 201, et seq.), hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III.

Defendant is, and has been since 1950 and long prior thereto, a corporation organized under and existing by virtue of the laws of the State of Cali-

fornia, having its principal office and place of business located at 1335 South Figueroa Street, Los Angeles, California, and one of its many branch warehouses located at 825 East Fourth Street, Los Angeles, Los Angeles County, California, both within the jurisdiction of this Court. At said branch warehouse, [2*] usually referred to as the Alameda warehouse, defendant is, and has been since 1950 and prior thereto, engaged in the handling, packing and storing of household and commercial goods.

IV.

At all times hereinafter mentioned, defendant employed and is employing approximately 32 employees in and about its Alameda branch warehouse in Los Angeles, California, in the handling, packing and storing of goods in interstate commerce within the meaning of the Act. Substantial quantities of the said goods handled, packed and stored by these employees have been and are being received in interstate commerce from points in other states and outside the United States, and have been, and are being handled, packed, shipped, delivered and transported in interstate commerce to points in other states and outside the United States.

V.

Defendant repeatedly has violated, and is violating, the provisions of Sections 7 and 15(a)(2) of the Act by employing many of its employees at its Alameda branch warehouse in interstate commerce,

*Page numbering appearing at foot of page of original Certified Transcript of Record.

as aforesaid, for work weeks longer than forty (40) hours since January 1, 1950, without compensating these employees for their employment in excess of forty (40) hours in work weeks during such perio[d] at rates not less than one and-half times the regular rates at which they were employed.

VI.

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516. [3]

VII.

Defendant, an employer subject to the provisions of the Act, repeatedly has violated, and is violating, the provisions of Sections 11(c) and 15(a)(5) of the Act, at its Alameda branch warehouse, in that since January 1, 1950, it has failed to make, keep and preserve adequate records of its employees and the wages, hours and other conditions and practices of employment maintained by it, as prescribed by the said regulations, in that the records kept by defendant failed to show adequately, among other

things, the hours worked each work day and each work week, the regular rate of pay, the basis upon which wages are paid, the total straight-time earnings for each work week, and the total weekly overtime excess compensation, with respect to many of its employees.

VIII.

Defendant has since January 1, 1950, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

/s/ STUART ROTHMAN,
Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ GEORGE E. DUEMLER,
Attorney, United States Department of Labor,
Attorneys for Plaintiff.

[Endorsed]: Filed January 27, 1954. [4]

[Title of District Court and Cause.]

ANSWER

The defendant answers plaintiff's Complaint as follows:

I.

Defendant has no information or belief sufficient to enable it to answer the allegations contained in paragraph I of the Complaint, and upon that ground, denies generally and specifically each and every allegation of said paragraph.

II.

Defendant denies generally and specifically each and every allegation of paragraph II of the Complaint.

III.

Defendant denies generally and specifically each and every allegation in paragraph III of the Complaint, except that it admits that it is, and since prior to 1950 has been, a corporation organized under and existing by virtue of the laws of the State of California, having its principal office and place [5] of business located at 1335 South Figueroa Street, Los Angeles, California, and that one of its branch warehouses is located at 825 East Fourth Street, Los Angeles, Los Angeles County, California, which is usually referred to as the Alameda warehouse, and that among the activities conducted by defendant at such warehouse are the handling, packing and storing of goods.

IV.

Defendant denies generally and specifically each and every allegation of paragraph IV of the Complaint, except that defendant alleges that at the time of filing of the Complaint, approximately ten employees were employed by defendant at its Alameda branch warehouse, and that among the activities carried on by said employees are the handling, packing and storing of goods.

V.

Defendant denies generally and specifically each and every allegation of paragraph V of the Complaint.

VI.

Defendant has no information or belief sufficient to enable it to answer the allegations of paragraph VI, and upon that ground denies generally and specifically each and every allegation of said paragraph, except that defendant is informed and believes that the Administrator of the Wage and Hour Division of the United States Department of Labor has issued or promulgated regulations concerning record keeping by employers subject to the various provisions of the Fair Labor Standards Act.

VII.

Defendant denies generally and specifically each and every allegation of paragraph VII of the Complaint.

VIII.

Defendant denies generally and specifically each

and every allegation of paragraph VIII of the Complaint. [6]

For a Further, Separate, Distinct and Affirmative Answer and Defense, Defendants Allege:

I.

The Court does not have jurisdiction over the subject matter of the action for the reason that the activity of defendant and each of its employees, referred to in the Complaint, are exempt under the provisions of Section 13(a)(1), Section 13(a)(2) and Section 13(a)(4) of the Fair Labor Standards Act, as amended.

For a Second, Further, Separate, Distinct and Affirmative Answer and Defense, Defendants Allege:

I.

The Complaint herein and each and every allegation fails to state a claim upon which relief can be granted.

Wherefore, defendant prays that plaintiff have and recover nothing from his Complaint either by way of injunctive process or otherwise; that defendant recover its costs incurred herein and be given such other relief as may seem proper to the Court.

Dated: March 9, 1954.

/s/ LUCIEN W. SHAW,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 9, 1954. [7]

[Title of District Court and Cause.]

STIPULATION AND ORDER

The parties hereto through their respective attorneys hereby stipulate to the following facts:

I.

Defendant is, and has been since 1950, and long prior thereto, a California corporation, having its principal office and place of business located at 1335 South Figueroa Street, Los Angeles, California. The business of defendant includes the moving and storage of household goods, the moving of used office equipment and furniture, the moving of complete offices, stores and commercial and industrial operations, rug cleaning, fur storage, rental of office and building space and storage of commercial goods. Defendant owns approximately 20 per cent of the stock of Bekins Van Lines Co., which is a motor common carrier of household goods throughout the United States. [9]

II.

Defendant operates 36 warehouses which are grouped in 19 divisions or districts in various cities within the State of California, and at each warehouse employees are regularly engaged in the storage, cartage, packing and shipping of household goods, and each is used as a terminal point for the moving by motor van of household goods both locally and for long distances. All of said warehouses except one regularly engage in the receiving, storing

and delivery of commercial goods. Ten of them have railroad sidings.

III.

The defendant has 19 warehouses in the Los Angeles metropolitan area, which for purposes of administration are divided into 10 divisions or districts. In the central part of the City of Los Angeles, California, defendant has five warehouses which are known as the East Los Angeles Division. The main office and one warehouse of this Division is at 1335 South Figueroa Street, herein called "Figueroa." The other warehouses are "Grand Avenue," located at 3625 South Grand Avenue; "Crenshaw," located at 4174 West Pico Street; "Wilshire," located at 116-122 South Western Avenue, and "Alameda," located at Fourth and Alameda Streets (hereinafter called "Alameda"). The Alameda warehouse is approximately 1¾ miles from Figueroa, and the others are from 1.8 to 3.5 miles from Figueroa. Defendant's general office for the entire business is located at Figueroa.

IV.

The operation of defendant's divisions and districts other than the East Los Angeles Division are in no way involved in this lawsuit. The application of the Fair Labor Standards Act of 1938, as amended, to such other divisions and districts is not an issue in this case. Its application is asserted only with respect to employees at the Alameda warehouse. [10]

V.

Each of the warehouses included in the East Los Angeles Division contains warehouse space, loading docks, packing equipment and yard area for the servicing and operation of household goods motor vans, as well as for accommodating motor trucks. The Alameda and Grand Avenue warehouses are equipped with a railroad siding.

VI.

It is agreed that the following facts are true with respect to operation of Alameda by defendant:

(a) The Alameda warehouse is a five-story reinforced concrete building of approximately 60,000 square feet consisting of office space about 15x30 feet, truck and van loading docks, railway loading docks, and five storage areas.

(b) At Alameda, defendant is, and has been since 1950 and prior thereto, engaged in the handling, packing, moving and storing of household and commercial goods.

(c) The Alameda warehouse is located on a siding of the Southern Pacific Railroad where pool cars of household goods are regularly received and dispatched.

(d) Substantial quantities of the goods handled, packed and stored by defendant have been and are being received from points in other states and outside the United States and have been and are being handled, packed, shipped, delivered, transported,

and offered for transportation to points in other states and outside the United States.

(e) Defendant has employed and is employing approximately 11 of its employees in and about Alameda to perform the activities set forth in subparagraphs (b), (c) and (d) above.

VII.

It is agreed that the following facts are true with respect to the operation of defendant's East Los Angeles Division [11] and Alameda:

(a) All of the management, executive and administrative functions of the East Los Angeles Division are performed by individuals whose principal office and location is at Figueroa and who give direct orders to and supervise the employees at all five warehouses in the East Los Angeles Division, including Alameda, except that at each of the five warehouses there is a warehouse foreman through whom directions are given with respect to storage operations, although said individuals whose principal office is at Figueroa also give direct orders from time to time with respect to storage operations.

(b) There are two office employees at Alameda whose duties generally consist of the following: preparing documents used in connection with receipt and delivery of storage lots, maintaining stock cards on commercial storage, answering the telephone, figuring storage rates, preparing warehouse receipts and carrying on other comparable clerical work. There is one warehouse foreman at Alameda whose

duties generally consist of the following: physically handling and moving stored goods, checking stored goods in and out of the warehouse, supervising other warehouse employees, opening and closing the building, carrying on fire prevention measures, supervising and working on loading and unloading of freight cars, reporting incompetent work to supervisors but not hiring and not firing employees without approval of his supervisors, selecting locations in the warehouse for storing goods, and performing minor clerical work in connection with receipt and delivery of stored goods.

(c) The working force at the East Los Angeles Division is largely interchangeable among the various operating tasks: most of the drivers are competent as packers and craters and most of the packers and craters are competent as drivers or helpers on moving jobs. These employees are frequently shifted [12] back and forth from one warehouse to another within the East Los Angeles Division; for example, one or more employees are shifted to Alameda on an average of one day per week and one or more employees are shifted from Alameda to another warehouse in the East Los Angeles Division on an average of two days per week.

(d) With occasional exceptions, all contacts and relations of defendant with customers whose goods are being stored or worked upon at Alameda are conducted and carried on at Figueroa, the head office location of the East Los Angeles Division.

(e) With minor exceptions, all of the accounting records pertaining to activities at Alameda are prepared and maintained at the Figueroa office of the East Los Angeles Division. All accounting records are maintained for the East Los Angeles Division as a unit.

(f) No financial statements are separately prepared or maintained by defendant for Alameda. Financial statements, including profit and loss statements and balance sheets are prepared monthly for each division as a whole, including the East Los Angeles Division of defendant as a whole, and are not broken down or classified in any manner for the respective warehouses located within the said Division, including Alameda.

(g) A single set of bank accounts is maintained by defendant for the entire East Los Angeles Division, and all financial transactions, without segregation, for the entire Division are handled through said bank accounts. No bank accounts are maintained separately for Alameda.

(h) Payroll records are not handled separately for Alameda but are maintained at the Figueroa office as a part of the payroll records for the entire Division.

(i) All of the employees of defendant working at Alameda are members of a single Local (No. 389) of the [13] International Brotherhood of Teamsters Union, which Local includes, without segregation, all of the union employees of the defendant work-

ing for its East Los Angeles Division and other divisions in the Los Angeles metropolitan area. A single labor union contract uniformly applies to all of the employees of defendant in its warehouses in the Los Angeles metropolitan area, including the East Los Angeles Division.

(j) Defendant purchases in large lots, the following supplies, which after their purchase are stored in one or another of its warehouses until needed, for use by all of its warehouses in the Los Angeles metropolitan area: naphthalene flakes, kraft paper, new cartons, gum tape, nails, heavy twine, rope, toilet paper, and towels. All other supplies for the East Los Angeles Division are purchased by the Division in large lots for the use of the entire Division, including the following: boxes, barrels, shredded paper, paper pads, corrugated paper, tissue paper, small tools, office supplies, office furniture and fixtures, business machines and typewriters. No supplies or materials are purchased by defendant separately for the needs or requirements of Alameda alone. The East Los Angeles Division operates a repair and maintenance shop at Figueroa for all of the automotive equipment which it operates from all warehouses in the Division, and maintains there a single inventory of automotive parts and supplies for the use of the shop.

VIII.

Attached hereto, marked Exhibit "A" and made a part hereof is a collective bargaining agreement

between defendant and Local Union No. 389 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Sections 10, 10-a, 14, 14-a and 19 of said agreement deal with the question of hours of work and overtime payments. The substantive provisions of the contract do not differ, except as to [14] rates of pay, from the contracts previously in effect since 1950.

IX.

Of the approximately 11 employees employed in and about the defendant's Alameda warehouse, one is specifically exempted by section 13(a)(1) of the Act from its overtime provisions because he is employed in a bona fide executive capacity as defined in Regulations 541.1. It is with respect to the pay practices in the case of the remaining 10 employees (and ex-employees who were similarly employed) that plaintiff has alleged violations of the overtime and record-keeping provisions of the Act.

X.

Two of said employees were working foremen and received only straight monthly salaries, although they regularly worked in excess of 40 hours per week. Six warehousemen and packers were paid by the hour and although they received time and one-half for all hours worked in excess of 8 per day and 48 per week, there were many work weeks when they received only straight time for hours worked between 40 and 48. Two office employees were paid by the hour and regularly worked 48 hours per

week, with time and one-half pay for hours in excess of 40 per week. Ex-employees in jobs comparable to the above were similarly compensated.

XI.

Defendant, since January 1, 1950, with respect to all of its employees working in the East Los Angeles Division, including those working at Alameda, has maintained records with respect to such employees of their names, home addresses, occupations and place or places of employment, and has maintained with respect to such employees daily and semi-monthly records of hours worked. Defendant has not, with respect to such employees, maintained records of hours worked in each week or wages paid on a weekly basis. [15]

XII.

It is agreed and the Court may accept as established fact without further proof that the percentage tests of section 13(a)(2) of the Fair Labor Standards Act of 1938, as amended, are satisfied if the East Los Angeles Division is a single "establishment" within the meaning of section 13(a)(2), the business activities of which are considered together as a unit, but that such tests are not met in the case of Alameda if Alameda alone is a single "establishment" within the meaning of section 13(a)(2), the business activities of which are considered separately as a unit.

XIII.

The parties hereto reserve the right to object to any of the facts stipulated herein as being incom-

petent, irrelevant or immaterial. The parties also reserve the right to supplement the above-stipulated facts by adducing evidence on any of the matters dealt with herein not inconsistent herewith.

Issue of Law

The meaning of "establishment" as that term is used in section 13(a)(2) of the Fair Labor Standards Act, as amended, and whether the Alameda warehouse is such an establishment or whether the entire East Los Angeles Division is such an establishment.

The foregoing stipulation is hereby approved and it is so ordered: 7/12/54.

/s/ JAMES M. CARTER,
Judge of the United States
District Court.

/s/ STUART ROTHMAN,
Solicitor; [16]

/s/ WILLIAM A. LOWE,
Chief of Trial Litigation
Branch;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ GEORGE E. DUEMLER,
Attorney, United States Department of Labor,
Attorneys for Plaintiff.

/s/ LUCIEN W. SHAW,
Attorney for Defendant. [17]

EXHIBIT A

Agreement

This Agreement is between ...., hereinafter referred to as the Company, and Local Union No. ...., affiliated with the I.B. of T.C.W. & H. of A., hereinafter referred to as the Union. [18]

Witnesseth

Designation of Bargaining Agency and Jurisdiction

Section I: The Company recognizes the Union as the sole and exclusive bargaining agency for all employees within the jurisdiction of the Local Union described as follows: All truck drivers, packers, craters, order fillers, checkers, warehousemen, loaders, helpers and working foremen.

Section 2: Whenever the Company requires new or additional employees for work covered by this Agreement, the Company shall first call upon the Union. The Company may then select between candidates proposed by the Union and candidates obtained from any other source whatsoever and such selection shall be made upon merits and ability and without consideration to membership or non-membership in the Union. All employees covered by this Agreement and all employees subsequently hired must become and remain members of the Union in good standing within thirty-one (31) days of date

Exhibit A—(Continued.)

of hire or date of execution of this Agreement whichever is later, as a condition of employment.

Section 2-a: Upon notice by the Union that any employee is not in good standing, the Company shall have a maximum of five (5) days to replace such employee. Such replacements shall be employed in accordance with the provision of this Agreement applying to new employees.

The Working Day

Section 3: New help without previous experience in the industry here or elsewhere may be employed for a period of thirty (30) calendar days at an apprentice rate of ten (10) cents per hour below the lowest rate for the classification in which hired.

Section 3-a: New help with previous experience in the industry here or elsewhere may be employed at the regular rate for a period of thirty (30) calendar days before becoming regular employees.

Section 3-b: Regular employees shall be those who have been employed for a period of thirty (30) calendar days, and shall be advised in advance when there is no work for them, otherwise they are guaranteed eight (8) hours' pay. Notice may be given by bulletin board or through employee phoning dispatcher.

Section 3-c: When regular employees are ordered to report for duty they shall be guaranteed

Exhibit A—(Continued.)

eight (8) hours' work at rates hereinafter agreed to except in cases of lay-off at the employee's request.

Section 4: Casual labor shall receive the rate of pay of regular employees, and shall be guaranteed the regular work day of eight (8) hours, providing that if they are dismissed after working a lesser number of hours they shall receive pay at the rate of time and one-half for all hours worked, and are guaranteed at least two (2) hours' pay.

Section 5: All men are to be compensated from the time they start working on any day until discharged from duty at the end of the day, excepting time out for meals.

Section 6: The Company shall pay or provide transportation from warehouse at which employees are ordered to report, to any other place of work during the day and return to starting warehouse.

Section 7: Any employee who is transferred during day to work carrying a lower rate of pay shall not have his pay reduced to that of the lower classification unless he works four (4) hours or more at the lower classification, in which case he shall be paid at the lower rate for all hours worked at such lower rate.

Section 7-a: Where employees are raised during the day from a lower classification to a higher one, payment will be made at the rate applicable for the time worked in each classification.

Exhibit A—(Continued.)

Section 8: An employee regularly assigned to the warehouse shall be a warehouseman and receive warehouseman's pay as provided in this Agreement.

Section 9: Any employee whose earing capacity is limited because of a physical condition, or any other infirmities, may be employed at a wage scale below that herein provided, subject to prior special agreement with the Union in each case.

Overtime and Holiday Pay

Section 10: All employees shall receive the overtime rate of time and one-half before 7:00 a.m., and after eight (8) consecutive hours of work, or in any event for hours worked after 9:00 p.m. Any exception shall only be by prior mutual agreement between the Union and the Company.

Section 10-a: All work performed on Sundays shall be at time and one-half rates. The following days are agreed upon as regular holidays:

New Year's Day,
Memorial Day,
Fourth of July,
Labor Day,
Thanksgiving Day,
Christmas Day.

A regular employee who is on the payroll of the Company for a period of thirty (30) calendar days immediately preceding one of the holidays specified above and who is available for work on the regular

Exhibit A—(Continued.)

work days immediately preceding and following such holidays, shall be paid for such holiday, on the basis of eight (8) hours at the applicable regular rate, if he does not work on such holiday, provided however, that if the employee is not available for work due to illness of not more than thirty (30) days duration, he shall receive such holiday pay. The holiday shall also be paid if it falls in a period when an employee is on vacation.

If an employee works on one of the above mentioned holidays, he shall be paid one and one-half times the regular hourly rate for all time worked on such holidays, in addition to the holiday pay.

Discharge

Section 11: The Company may discharge any employee for cause, such as drinking while on duty, dishonesty, or failure to perform his work in a satisfactory manner.

Vacations

Section 12: All employees covered by this Agreement shall be entitled to one (1) week's vacation with pay after one (1) year of continuous service. Employees with two (2) years' or more of continuous service shall be entitled to two (2) weeks' vacation with pay.

Section 12-a: In case of severance of employment either voluntarily or by discharge, except in case of proven dishonesty, employees shall be en-

Exhibit A—(Continued.)

titled to pay in lieu of vacation pro-rated as follows: Employees who have worked from one (1) to two (2) years shall receive (1) day's pay for each full thirty (30) days over six (6) months since the last anniversary date of employment. Employees who have worked two (2) years or more shall receive two (2) days' pay for each full thirty (30) days over six (6) months since the last anniversary date of employment.

Section 12-b: Arranging vacations, the Company may specify periods during which no vacations may be taken on account of rush work and vacations will be taken as far as possible, during slack periods.

Section 12-c: Seniority shall prevail in choice of vacations.

Seniority

Section 13: Seniority shall consist of length of continuous service with the Company and such continuity shall not be broken by reason of leaves of absence bona fide as sickness or injury or layoffs not exceed one hundred twenty (120) days.

Ability to do the work being equal, the employee with the least seniority shall be the first laid off in the event of the reduction of the working force, and the last employee laid off shall be the first rehired.

Emergency Clause

Section 14: In the event the Company reduces the work week to less than the normal work week of forty-eight (48) hours in six (6) days, Monday

Exhibit A—(Continued.)

through Saturday, for any employee covered by this Agreement, this Agreement shall be considered open for negotiations regarding wages and hours only. This provision shall not apply in the event of reduction in the work week as a result of inclement weather or inability on the part of the Company to furnish work, but is for the purpose of providing adjustments in wages, if the Company changes the normal work week in an effort to avoid overtime pay.

Section 14-a: The interpretation of this clause shall be subject to Section 15 insofar as the question as to whether or not this Agreement may be opened under this clause; provided further, that if this Agreement may be so opened, Section 16 shall not apply in the event of failure to agree on adjustments.

Section 15: Upon the request of the Union on behalf of a member whose time or pay is questioned, the Company agrees to submit the payroll records of such employee for audit by an agent of the Union. [19]

Arbitration

Section 16: In the event of any dispute between Company and the Union as to the meaning or interpretation of any provision of this Agreement, or in the event of any alleged grievance, the parties hereto shall exercise every amicable means to settle or adjust such dispute or grievance; but in the event of failure to accomplish the settlement or adjust-

Exhibit A—(Continued.)

ment thereof, such dispute or grievance shall be referred to a Board of three arbitrators and their majority decision shall be binding upon the parties involved. The Board of Arbitration shall consist of one representative to be selected by the Company and one representative to be selected by the Union. The representatives so selected shall meet within three (3) days of their appointment and select a third member of the Board, who, when so selected, will act as Chairman. Upon failure of the representatives as selected to agree upon the Chairman within a further three-day period, both parties agree that the American Arbitration Association shall be called upon to select a Chairman within ten (10) days. The Board when selected shall meet within a further five-day period at which time both parties will present their cases, and unless a mutual agreement as to extension of time shall be agreed upon by both parties, it will be mandatory upon the Board to render its finding and decision within five (5) days after conclusion of hearings.

Section 16-a: The expenses of the Board of Arbitration shall be borne equally by the parties hereto.

Section 16-b: Pending final adjustment of any dispute or grievance, there shall be no suspension of work by strike, work stoppage, slowdown, sitdown, or lockout, provided that this restraint of economic action will not be binding upon the Union or the Company if the other party refuses to be governed by the majority decision of the arbitration board.

Exhibit A—(Continued.)

Section 17: This Union is not in favor of sympathetic strikes and will do everything within its power to prevent them.

General Conditions

Section 18: No employee shall suffer a reduction in the rate of pay because of signing of this Agreement.

Section 19: Nothing in this Agreement shall in any way be construed as altering, changing or modifying any of the provisions of State or Federal law with respect to the employee concerned hereunder. In the event that State or Federal regulation or legislation shall in any manner conflict with the terms of this Agreement, said conflict shall not alter or change any of the remaining provisions herein, but such regulations or legislation shall become a part of this Agreement.

Wage Scale

Section 20: The following shall be the minimum wages paid for Local Operations:

	Per Hour	Overtime
All drivers	$1.95	$2.925
Packers	1.95	2.925
Craters	1.95	2.925
Order Fillers	1.95	2.925
Warehousemen	1.95	2.925
Loaders	1.95	2.925
Helpers	1.80	2.70
Working Foreman	2.05	3.075

Exhibit A—(Continued.)

Winch Truck Operators (When operating winch) shall receive an additional fifteen cents (15c) per hour, except when handling household goods.

All salaried employees in the above classification shall receive an equivalent increase to the increases herein provided.

Long Line Provisions

Section 21:

	Per Hour	Overtime
Drivers	$2.10	$3.15
Drivers' Helpers	2.00	3.00

(a) When a long line driver or helper has worked in excess of sixty (60) hours in any calendar week, he shall be paid at the rate of time and one-half for all work performed in excess of sixty (60) hours.

(b) In addition to the above, following conditions shall apply to long line hauls only:

(1) It is agreed that any job requiring the driver or crew to be away from home overnight or out of the city after midnight shall be a long line haul, and work on the job shall be paid for at the rate herein mentioned.

(2) When two men are used on an operation, one man shall be designated as the driver and shall receive not less than $2.10 per hour for all time worked. The second man, or helper shall receive

Exhibit A—(Continued.)

$2.10 per hour for all time spent driving, and for all other time worked shall receive not less than $2.00 per hour. If for any reason it becomes necessary during a trip to designate the helper as the man responsible for the operation of the trip, he shall receive not less than $2.10 per hour for all time worked.

(c) When drivers and helpers are held away from their home overnight or for their rest period, they shall be compensated on the following basis:

(1) Sixteen (16) hours after arrival two dollars and ten cents ($2.10) per hour will be paid until the driver is put to work, but not to exceed sixteen dollars and eightly cents ($16.80). The sixteen (16) hour period shall start after the hours paid for have elapsed.

(1-a) Sixteen (16) hours after arrival, $2.00 per hour will be paid until the helper is put to work, but not to exceed $16.00. The sixteen (16) hour period shall start after the hours paid for have elapsed.

(2) All drivers and helpers shall be compensated at a regular hourly rate of pay after eight (8) hours of layover time at any shuttle point not located in a city or town with sleeping accommodations.

(3) That for any and all subsequent work days of twenty-four (24) hours each, the driver shall receive a minimum days pay of eight (8) hours, or

Exhibit A—(Continued.)

be deadheaded to his home terminal or breaking point.

(4) All deadheading shall be paid for at one-half the regular hourly rate of pay.

(5) That where a layover falls on Sunday or National holiday, the drivers shall be paid five dollars and fifty cents ($5.50) subsistence for such Sunday or National Holiday to consist of New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day. Long Line Drivers and Helpers who work at all the local wage scale during the week in which the holiday occurs shall receive pay for the holiday as provided in Section 10-a of this Agreement.

(6) All men shall be compensated from the time they are ordered to report for duty at home terminal.

(7) The sum of five dollars and fifty cents ($5.50) per night shall be paid drivers and helpers when they are away from home terminal.

Security Fund Payments

Section 22: The Moving and Storage industry of Southern California and the Union have established a Trust Fund designated as the Moving and Storage Industry Teamsters Security Fund, for the purpose of providing for the benefit of employees and their dependents payments for any or

Exhibit A—(Continued.)

all of the following: Life, Accident, Disability and Sickness Insurance, and Medical and Hospital Expenses. Said Trust Fund is administered by a Board of Trustees on which the employees and the employers are equally represented.

The Company agrees to pay into said Trust Fund the sum of $10.35 per month for each of its regular employees, commencing April 1, 1954. It is understood that said sum is presently necessary to maintain the total dollar value of benefits presently provided by the insurance policy currently in effect. Should the trustees of said Trust Fund, at any time during the term of this agreement, determine that a sum less than $10.35 per month is necessary to maintain the total dollar value of benefits presently so provided, then said monthly payments shall be reduced to the figure found to be sufficient. Provided however, in making any such determinations, the trustees shall not establish any figure in excess of $10.35 per month.

Term of Agreement

Section 23: This Agreement shall become effective this 1st day of June, 1954, except as provided in Section 22, and shall remain in effect until April 1, 1956, and it is further understood and agreed that wages, hours and working conditions will be subject to revision May 1, 1955, provided either party gives sixty (60) days notice in writing to the other

Exhibit A—(Continued.)

of its desire to modify these conditions, prior to May 1, 1955.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. .....

By .....

EMPLOYER .....

....

By .....

[Endorsed]: Filed July 12, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having duly come on for trial on September 7, 1954, at 2 p.m., before the Honorable James M. Carter, judge presiding; George E. Duemler appearing as counsel for plaintiff and Lucien W. Shaw as counsel for defendant, and the Court having heard and considered the evidence both oral and documentary offered by the respective parties and the matter having been submitted to the Court for decision, the Court being fully advised in the premises now makes its Findings of Fact as follows:

Findings of Fact

(1) Plaintiff does not contend that any of defendant's warehouses either in the East Los Angeles Division or elsewhere fail to meet the tests of exemption as a retail or service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act, as amended, except only the Alameda warehouse. [22]

(2) The East Los Angeles Division of defendant, including Alameda, is a single establishment within the meaning of section 13(a)(2) of the Fair Labor Standards Act (29 U.S.C., sec. 213(a)(2)), the business activities of which are to be considered together as a unit, and as such an establishment, more than 50 percentum of its annual dollar volume of sales of goods or services is made within the state in which it is located and 75 percentum of its annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry. Such tests are not met in the case of the Alameda warehouse considered separately.

(3) All of the employees of defendant's East Los Angeles Division, including those at Alameda, are employed by a retail or service establishment which qualifies with the requirements of section 13(a)(2) of the Fair Labor Standards Act (29 U.S.C., sec. 213(a)(2)).

(4) Defendant is, and has been since 1950, and long prior thereto, a California corporation, having

its principal office and place of business located at 1335 South Figueroa Street, Los Angeles, California. The business of defendant includes the moving and storage of household goods, the moving of used office equipment and furniture, the moving of complete offices, stores and commercial and industrial operations, rug cleaning, fur storage, rental of office and building space and storage of commercial goods. Defendant owns approximately 20 per cent of the stock of Bekins Van Lines Co., which is a motor common carrier of household goods throughout the United States.

(5) Defendant operates 36 warehouses which are grouped in 19 divisions or districts in various cities within the State of California, and at each warehouse employees are regularly engaged in the storage, cartage, packing and shipping of household goods, and each is used as a terminal point for the moving by motor van of household goods both locally and for [23] long distances. All of said warehouses except one regularly engage in the receiving, storing and delivery of commercial goods. Ten of them have railroad sidings. Substantial quantities of the goods handled, packed and stored by defendant at its various warehouses have been, and are being, received from points in other states and outside the United States and have been, and are being, handled, packed, shipped, delivered, transported, and offered for transportation to points in other states and outside the United States.

(6) The business of defendant was commenced

in 1895 in Los Angeles, California. Thereafter, the company grew and expanded principally with respect to moving and storage of household goods until in 1945 it was operating moving and storage warehouse businesses with warehouses in the principal cities in the State of California.

(7) In 1946 and thereafter until the present time, defendant continued rapid expansion and growth of its business and facilities. It built approximately twenty new warehouses or warehouse additions during that period in many cities in California. It attempted to provide warehouse facilities by new construction to serve rapidly growing and expanding residence neighborhoods.

(8) In connection with its expansion from its beginning until the present time, it has been the policy of defendant to decentralize its management to the maximum extent possible. It is defendant's belief that moving and storage service can best be provided at its numerous warehouses through a local organization at the various locations which has full responsibility for all phases of the service provided. Defendant has therefore divided its warehouses into 19 divisions or districts, each of which has a district manager in charge who is responsible for all of its operations. In the Los Angeles [24] area, defendant has such district offices in its East Los Angeles Division, its Hollywood District, Beverly Hills District, Compton - Lynwood District, Glendale District, Wilmington District, which includes Hermosa and Redondo; Inglewood District,

Long Beach District, San Fernando Valley District, Pasadena District, Santa Ana District and Santa Monica District. The management of defendant believes in, and has adopted, adequate and thorough record keeping and control systems to measure the performance and success of its various district offices.

(9) Originally in defendant's operations in the Los Angeles metropolitan area, it was organized with a West Los Angeles Division and an East Los Angeles Division. The West Los Angeles Division included Hollywood, West Hollywood, Beverly Hills and Santa Monica, and the East Los Angeles Division included the warehouses at Alameda, Figueroa, Crenshaw, Wilshire and Grand Avenue which still are included in the East Los Angeles Division. Prior to 1946, following defendant's policy of decentralization, the West Los Angeles Division was divided into the Hollywood, Beverly Hills, and Santa Monica districts with separate district managers at each one. In 1946 and again in 1950, the executive management of defendant gave thorough consideration to the dividing into smaller units of the East Los Angeles Division and after considering the facts decided that it was not practical nor feasible to divide the East Los Angeles Division consisting of five warehouses into smaller units.

(10) Defendant's East Los Angeles Division consists of five warehouses in the central part of the city of Los Angeles. The photographs in plaintiff's Exhibit 1 are reasonable representations of

the exteriors of the five warehouses in the East Los Angeles Division. The main office and one warehouse of this division is at 1335 South Figueroa Street, herein called "Figueroa." The other warehouses are located at [25] 3625 South Grand Avenue (herein called "Grand Avenue"), 4174 West Pico Street (herein called "Crenshaw"), 116-122 South Western Avenue (herein called "Wilshire"), and Fourth and Alameda Streets (herein called "Alameda"). The Alameda warehouse is approximately 1¾ miles from Figueroa, and the others are from 1.8 to 3.5 miles from Figueroa. Defendant's general office for the entire business is located at Figueroa. Plaintiff's Exhibit 2 is a map of the city of Los Angeles showing the locations marked with red pencil of the five warehouses in the East Los Angeles Division.

(11) Each of the warehouses included in the East Los Angeles Division contains warehouse space, loading docks, packing equipment and yard area for the servicing and operation of household goods motor vans, as well as for accommodating motor trucks. The Alameda and Grand Avenue warehouses are equipped with a railroad siding. Upon plaintiff's Exhibit 2 is marked in blue pencil the approximate area which has been officially designated by defendant as the territory to be served by the East Los Angeles Division to the exclusion of defendant's other districts in the Los Angeles metropolitan area. The East Los Angeles Division is responsible for providing moving and

storage and other services in this territory but this territory is not further subdivided or broken down as to services to be rendered by any particular warehouse within the East Los Angeles Division.

(12) Defendant has numerous employees working for its East Los Angeles Division and rendering services of the type herein described. Eleven of these employees work at the Alameda warehouse of defendant. Of said 11 employees, 8 work hours in many work weeks in excess of 40 hours and less than 48 hours but do not receive overtime compensation for such hours worked in excess of 40 hours. Of the remaining 3 employees at Alameda, [26] one is specifically exempted from Sections 6 and 7 of the Fair Labor Standards Act by section 13(a)(1) thereof, as a bona fide executive employee, and two are office workers who are paid by defendant by the hour and regularly work 48 hours per week with time-and-one-half pay for hours in excess of 40 per week.

(13) The Alameda warehouse is a five-story reinforced concrete building of approximately 60,000 square feet consisting of office space about 15x30 feet, truck and van loading docks, railway loading docks, and five storage areas. There are two office employees at Alameda whose duties generally consist of the following: preparing documents used in connection with receipt and delivery of storage lots, maintaining stock cards on commercial storage, answering the telephone, figuring storage rates, preparing warehouse receipts and carrying on other

comparable clerical work. There is one warehouse foreman at Alameda whose duties generally consist of the following: physically handling and moving stored goods, checking stored goods in and out of the warehouse, supervising other warehouse employees, opening and closing the building, carrying on fire prevention measures, supervising and working on loading and unloading of freight cars, reporting incompetent work to supervisors, selecting locations in the warehouse for storing goods, and performing minor clerical work in connection with receipt and delivery of stored goods.

(14) Defendant, since January 1, 1950, with respect to all of its employees working in the East Los Angeles Division, including those working at Alameda, has maintained records with respect to such employees of their names, home addresses, occupations and place or places of employment, and has maintained with respect to such employees daily and semi-monthly records of hours worked. Defendant has not, with respect to such employees, maintained records of hours worked in each week of wages paid on a weekly basis. [27]

(15) Defendant's Alameda warehouse was built on property acquired in 1898 and was constructed shortly thereafter, and at that time was in the center of a prosperous residence area in the city of Los Angeles. Defendant's Figueroa warehouse was constructed on property acquired in 1907, and portions of the same were built between then and 1913, and at such time, Figueroa was adjacent to

the leading residence area in Los Angeles which was then along South Figueroa Street. The Crenshaw warehouse was built in approximately 1927 to serve the new residence areas in its area, particularly the Leimert Park area. The Wilshire warehouse was owned by the Wilshire Fireproof Storage Company in which defendant acquired a controlling interest in 1931, and from that time until the present, leased said warehouse from said controlled company. The Wilshire warehouse at the time of its acquisition served the prosperous Wilshire residence area. The Grand Avenue warehouse was acquired in 1942 to meet unusual requirements for space for storage of household goods resulting from World War II.

(16) After acquisition of the Alameda warehouse, the surrounding area changed greatly until at the present time it consists entirely of a heavy industrial and commercial neighborhood. The Figueroa warehouse is no longer adjacent to the finest residence area in the city of Los Angeles but has gradually changed to a commercial area with a heavy predominance of automobile dealers and boarding houses. The Crenshaw warehouse is still in the vicinity of substantial residence areas, but their character has deteriorated somewhat. The Wilshire warehouse is no longer adjacent to the finest residence area in Los Angeles, which has moved to other locations, but is still in the center of a substantial residence area. The character of the area surrounding the Grand Avenue warehouse has

not changed greatly since its acquisition by defendant. Because of [28] the changing conditions pertaining to the areas surrounding the warehouses in the East Los Angeles Division, defendant has changed the character of its business in that division. It now handles some commercial storage at each of these warehouses, although it still handles large amounts of household goods at all of them. It engages in larger moving jobs than formerly, some of them for enterprises such as law firms, hardware companies and commercial operations, which require large amounts of manpower and great flexibility in shifting employees from one job to another. Defendant has developed a record storage business at its Figueroa warehouse and leases substantial portions of its Crenshaw and Wilshire warehouses to a furniture dealer for the sale of furniture. Defendant has attempted to adjust its business in the East Los Angeles Division to meet changing conditions and has done so successfully, but could carry on the operations there as well or better if all of its business were carried on in a single large building instead of five buildings geographically separated.

(17) All of the management, executive and administrative functions of the East Los Angeles Division are performed by individuals whose principal office and location is at Figueroa and who give direct orders to and supervise the employees at all five warehouses in the East Los Angeles Division. These individuals make daily visits to each of the

warehouses in the division. They include a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager and a storage manager. Each of these individuals performs his duties in his respective field for the entire East Los Angeles Division. Together they are responsible for the success of the entire East Los Angeles Division and are responsible for the success of the operations of the Division as a whole. No one is responsible only for the success of Alameda or any one of [29] the other warehouses in the East Los Angeles Division.

(18) Defendant's East Los Angeles Division maintains moving van equipment at each of the five warehouses in the Division but all of the dispatching of all of them on all moving orders is handled by the dispatching office at the Figueroa main office of the Division, either by personal orders or by telephone orders.

(19) All of the sales activities of defendant are conducted from the Figueroa warehouse. Defendant has an active sales program which includes 7 salesmen for the East Los Angeles Division who are expected to and do carry on sales efforts and work in individual territories within the territory of the Division which are assigned to them. The territories assigned to the respective salesmen are assigned without relation to the location of the warehouses of the Division but the territories are assigned on the basis of approximately equal sales potential in each such territory.

(20) Eighty per cent of the customers of the East Los Angeles Division who deal with it either in person or by telephone do so at or to its Figueroa office. Defendant runs newspaper advertisements advertising its services in which the only phone number of the East Los Angeles Division listed is the telephone number at Figueroa.

(21) The working force at the East Los Angeles Division is largely interchangeable among the various operating tasks: most of the drivers are competent as packers and craters and most of the packers and craters are competent as drivers or helpers on moving jobs. These employees are frequently shifted back and forth from one warehouse to another within the East Los Angeles Division; for example, one or more employees are shifted to Alameda on an average of one day per week and one or more employees are shifted from Alameda to another warehouse in the East [30] Los Angeles Division on an average of two days per week.

(22) The accounting records for defendant's East Los Angeles Division are maintained at the Figueroa office as a single system of accounts and records. The East Los Angeles Division accounting system is the same as that used by defendant for its other districts. If defendant maintained a separate system of accounting records for each warehouse within the East Los Angeles Division, the cost would be more than 100% greater than at present if the system were maintained at each ware-

house, and more than 50% greater if the separate records were all maintained at the Figueroa warehouse. No separate accounting records are maintained for the individual warehouses in the East Los Angeles Division because of this greatly increased cost of doing so and because the management has no requirement or need for separate accounting information for each warehouse within the East Los Angeles Division.

(23) The accounting office of the East Los Angeles Division prepares periodic financial statements including profit and loss statements and balance sheets for the Division as a whole and these are not broken down or classified in any manner for the respective warehouses located within the East Los Angeles Division including Alameda. No financial statements or profit and loss statements are separately prepared or maintained by defendant for Alameda.

(24) A single set of bank accounts is maintained by defendant for the entire East Los Angeles Division, and all financial transactions, without segregation, for the entire Division are handled through said bank accounts. No bank accounts are maintained separately for Alameda. Payroll records are not handled separately for Alameda but are maintained at the Figueroa office as a part of the payroll records for the entire Division.

(25) Defendant purchases in large lots, the following supplies, which after their purchase are stored in one or another of its warehouses until

needed, for use by all of its warehouses in the Los Angeles metropolitan area; naphthalene flakes, kraft paper, and towels. All other supplies for the East Los Angeles Division are purchased by the Division in large lots for the use of the entire Division, including the following: boxes, barrels, shredded paper, paper pads, corrugated paper, tissue paper, small tools, office supplies, office furniture and fixtures, business machines and typewriters. No supplies or materials are purchased by defendant separately for the needs or requirements of Alameda alone. The East Los Angeles Division operates a repair and maintenance shop at Figueroa for all of the automotive equipment which it operates from all warehouses in the Division, and maintains there a single inventory of automotive parts and supplies for the use of the shop.

(26) It would not be practical, economic or good business practice for defendant to divide its East Los Angeles Division into smaller management, administrative or operating units because (a) the cost of doing so would be much greater than the present costs, (b) the present single administration, management and operation permit much greater flexibility which is required for the kind of business done by the East Los Angeles Division, and (c) the type of work being handled by defendant requires the present method of management, administration and operation.

(27) All of the employees of defendant working at Alameda are members of a single Local (No. 389)

of the International Brotherhood of Teamsters Union, which Local includes, without segregation, all of the union employees of the defendant working for its East Los Angeles Division and other divisions in the Los Angeles metropolitan area. A single labor union contract uniformly applies to all of the employees of defendant in [32] its warehouses in the Los Angeles metropolitan area including the East Los Angeles Division. The union contract applicable to all the employees of the East Los Angeles Division provides that the normal work week is 48 hours in 6 days, Monday through Saturday, and provides for no payment of overtime during such work week but does provide for overtime for work in excess of 8 hours in any one day. The contract provides that in the event of any change in this work week, the contract shall be considered open for negotiations regarding wages and hours. The International Brotherhood of Teamsters Union is one of the most powerful unions in the United States. Its representatives are familiar with and keep in close touch with the business and operating problems of the employers of its members including defendant.

(28) If defendant were forced to pay overtime to operating employees at its Alameda warehouse for work between 40 and 48 hours per week, this would upset prevailing wage patterns of defendant and create wage inequities between groups of its employees, which, in turn, would have a very serious adverse effect upon the relations of defendant with its employees and upon their morale.

(29) Degendant handles a substantially greater volume of business at its East Los Angeles Division on Saturdays than on any other day in the week and this is a convenience to the public. If defendant were required to pay overtime for work in excess of 40 hours per week and less than 48 hours in such week, defendant would have to increase its rates and the volume of its business on Saturdays would be substantially decreased. The public has an alternative to the use of defendant's services for the moving of household goods, through the use of trailers and rental trucks. Defendant would not be able to close its Alameda warehouse after its employees there had worked in excess of 40 [33] hours in one work week because the defendant's contract with the International Brotherhood of Teamsters Union provides for a normal work week of 48 hours, Monday through Saturday, and provides for re-opening the contract in the event of a change.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

(1) The Court concludes in all respects as set forth in the foregoing Findings of Fact and any Conclusion of Law that is contained therein is hereby expressly incorporated in these Conclusions of Law with the same force and effect as though expressly set forth therein.

(2) Defendant's East Los Angeles Division is a single establishment within the meaning of section 13(a)(2) of the Fair Labor Standards Act (29 U.S.C., sec. 213(a)(2)) and its Alameda warehouse is not alone a single establishment within the meaning of said section.

(3) All of the employees of defendant at its Alameda warehouse are employed by a retail or service establishment as defined in section 13(a)(2) of the Fair Labor Standards Act (29 U.S.C., sec. 213(a)(2)) and therefore are exempt from the requirements of sections 6 and 7 of said Act (29 U.S.C., sec. 206 and 207).

Let Judgment Be Entered Accordingly.

Dated: October 18, 1954.

/s/ JAMES M. CARTER,
Judge, United States District Court. [34]

Presented and approved:

By /s/ LUCIEN W. SHAW,
Attorney for Defendant.

Receipt of copy acknowledged and approved:

Lodged September 20, 1954.

[Endorsed]: Filed October 18, 1954.

In The United States District Court For The Southern District of California, Central Division.

File No. 16256-C

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

BEKINS VAN & STORAGE COMPANY, a Corporation,

Defendant.

JUDGMENT DENYING DEMAND FOR INJUNCTION AND OTHER RELIEF

This cause having duly come on for trial on September 7, 1954, at 2 p.m. before the Honorable James M. Carter, judge presiding; George E. Duemler appearing as counsel for plaintif, and Lucien W. Shaw as counsel for defendant, and the Court having heard and considered the evidence both oral and documentary offered by the respective parties and the matter having been submitted to the Court for decision, and the Court being fully advised in the premises, and having made and filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith.

Now, Therefore, by reason of the findings and law aforesaid, It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing by reason of its action against the defendants or any of them; that plain-

tiff's demand for injunction [36] be and the same is hereby denied; and that the plaintiff's complaint be and it hereby is dismissed.

Dated: October 18, 1954.

/s/ JAMES M. CARTER,
Judge, United States District Court.

Presented and Approved:

By /s/ LUCIEN W. SHAW,
Attorney for Defendant.

Copy received September 16, 1954.

Lodged September 20, 1954.

[Endorsed]: Filed October 18, 1954.

Docketed and entered October 18, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 18, 1954.

Dated this 15th day of December, 1954.

/s/ STUART ROTHMAN,
Solicitor;

/s/ BESSIE MARGOLIN,
Assistant Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ GEORGE E. DUEMLER,
Attorney, United States Department of Labor,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed December 15, 1954.

In The United States District Court, Southern District of California, Central Division

No. 16256-C Civil

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

BEKINS VAN & STORAGE COMPANY, a Corporation,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, September 7, 1954

Appearances:

For the Plaintiff:

GEORGE E. DUEMLER,
Attorney, United States Department of Labor.

For the Defendant:

LUCIEN W. SHAW, Esq.

Tuesday, September 7, 1954—2:00 P.M.

The Court: Call the case.

The Clerk: No. 16256-C, James P. Mitchell, vs. Bekins Van & Storage Company, for trial.

Mr. Duemler: Plaintiff is ready.

Mr. Shaw: Defendant is ready. [2]

* * *

FRED L. PHILLIPS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Fred L. Phillips.

Direct Examination

By Mr. Duemler:

Q. Where do you live, Mr. Phillips?

A. Long Beach, California.

Q. What is your business or occupation?

A. At the present time I am retired, as of August 1st, [8*] after fourteen years with the United States Department of Labor, Wage and Hour Division.

Q. Did you have occasion to make an investigation of the defendant's Alameda warehouse?

A. I did. [9]

* * *

Q. Did you visit the Alameda warehouse?

A. I did.

Mr. Duemler: I have some photographs. May I

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

have them marked Plaintiff's Exhibit for identification?

The Court: No. 1.

The Clerk: Plaintiff's Exhibit No. 1 for identification. I will mark the whole folder.

(The exhibit referred to was marked Plaintiff's Exhibit 1, for identification.)

Q. (By Mr. Duemler): I show you a folder with some photographs marked Plaintiff's Exhibit No. 1 for identification, and ask you to look at the four photographs on page 1 [10] and tell me if you know which warehouse that is.

A. That is the Alameda warehouse. Most of the property facing on Alameda Street, that is, adjacent to Alameda Street.

The Court: What about the other pages—all Alameda?

Mr. Duemler: No; they are the other four warehouses in this East Los Angeles division.

The Court: Can we stipulate to these photos?

Mr. Shaw: I am perfectly willing to, your Honor.

The Court: Do you offer them in evidence?

Mr. Duemler: I would like to offer them in evidence, if the court please.

The Court: Received as Plaintiff's Exhibit No. 1. Let me look at them.

(The exhibit, heretofore marked Plaintiff's Exhibit No. 1, for identification, was received in evidence.)

(Testimony of Fred L. Phillips.)

Mr. Duemler: I have one other exhibit that I would like to——

Mr. Shaw: Pardon me, your Honor. My stipulation is that they are authentic photographs of the five warehouses in the East Los Angeles division.

The Court: Each page is separately titled, so we can tell which pictures apply to which.

Mr. Shaw: That is correct. [11]

Mr. Duemler: May I have this marked as Plaintiff's Exhibit for identification?

The Court: Plaintiff's Exhibit 2 for identification, a city map of Los Angeles.

(The exhibit referred to was marked Plaintiff's Exhibit 2, for identification.)

Q. (By Mr. Duemler): I show you an advertising map of Los Angeles marked Plaintiff's Exhibit No. 2 for identification, in which Bekins warehouses are shown, and the five whose pictures were introduced have been identified with red marks. I will ask you to look at that and state whether or not you know that is a fair representation of the location of these five warehouses.

Mr. Shaw: Your Honor, I will stipulate that this map portrays the location of these warehouses, the distances between them being as set forth in the stipulation of facts already on file.

The Court: All right. Do you offer the exhibit?

Mr. Duemler: I offer it as an exhibit, if the court please.

(Testimony of Fred L. Phillips.)

The Court: Exhibit 2 received in evidence. Let me see it.

(The exhibit, heretofore marked Plaintiff's Exhibit 2, for identification, was received in evidence.) [12]

Mr. Duemler: You may inquire. That is all of this witness.

Mr. Shaw: I have no cross-examination, your Honor.

The Court: Thank you. You may step down.

Mr. Duemler: If the court please, that is the plaintiff's case, together with the stipulation which I understand has been signed and filed.

Mr. Shaw: I would like to call Mr. Andreson, but may I make a brief statement first? I would like to outline the witnesses that I have and the portions of the testimony that they will cover, both for the benefit of the court and opposing counsel.

Mr. Andreson, the comptroller of Bekins, will testify generally upon the background of the Bekins Company, a little of its history, its physical layout, matters of its organizational approach and policy.

Mr. Erxleben, its personnel director, will testify briefly on the few matters pertaining to personnel aspects of this case.

Mr. Schmidt, the assistant comptroller, will testify on some detailed matters relating to the accounting methods and bookkeeping system in use, with particular reference to the East Los Angeles division.

And Mr. Elliott, who is a vice-president and general manager of the East Los Angeles division, will testify on the organization of the East Los Angeles division and his [13] administration of it, and questions pertaining thereto.

So we will proceed in that manner if it is agreeable to the court.

Mr. Andreson.

The Court: Before you call Mr. Andreson I would like to say something.

I am only a new judge, five years up here, and I suppose the judicial thing to do is to sit up here and look solemn, and then when the case is over with decide it. But I would be less than frank if I didn't tell you that I think this is a small horse soon curried.

I have had this case some time, I held a pre-trial, your briefs came in and I looked them over, and I looked them over again before I came on the bench. I have difficulty going along with the plaintiff on the showing that you have made already. I don't want to cut the defendant off from making a record here, and I think I should permit you to make the kind of a record that you want to, but I can't see the plaintiff's theory in this case.

You filed an excellent brief, Mr. Duemler, and I have read it. Maybe you might think of something in oral argument that you haven't put in your brief, but my guess is, knowing how thoroughly you prepare these cases, that you have said about everything that you could say in that brief. [14]

* * *

WILBUR R. ANDRESON

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Wilbur R. Andreson.

Direct Examination

By Mr. Shaw:

Q. Will you state your place of residence, Mr. Andreson?

A. 416 South Beloit Avenue, Los Angeles.

Q. Would you state your present position with Bekins Company, please?

A. Presently my position is treasurer and controller of Bekins Van & Storage Company, and I am also a member of the board of directors. [22]

Q. Will you state how long you have been with the Bekins Company?

A. Eight years next month.

Q. Has your position been the same during all of that period?

A. Seven years controller.

Q. And just very briefly what are your duties in that connection?

A. My duty is to have charge of most of the matters that are of a financial nature, a general jurisdiction over administrative procedures, accounting, taxes, various phases of our insurance program, and I would say generally administrative jurisdiction.

(Testimony of Wilbur R. Andreson.)

Q. Does that include organizational matters?

A. I am involved in matters relating to the organization, yes, sir.

Q. Would you state briefly, very briefly, the history of the Bekins Van & Storage Company of California, when it was founded and just very briefly its progress from that time until now?

A. The present company or the operation as it now exists was originally established, I believe, in 1895 by Martin Bekins, who is the father of our present president of the organization. Since that time and steadily through the years up to the war there was gradual growth with the addition [23] of various warehouses in different cities in California. I might also mention that the present corporation was incorporated in 1923. Since the war the growth has continued and there has been the additions of a substantial number of warehouses, and again in different metropolitan communities throughout California.

Q. Would you describe briefly the type of business which is done by the Bekins Company?

A. The business embraces the storage of household goods, the transportation of household goods, packing and crating of household goods, rug-cleaning, storage of furs, storage of commercial goods, the renting and leasing of office space and building space.

Q. Of those various activities which would you say is the predominant one?

(Testimony of Wilbur R. Andreson.)

A. The predominant one, I would say, would be the transportation of household goods, followed, secondly, by the storage of household goods.

Q. Would you give a very brief description of the physical facilities of the Bekins Company; first, up to the time at the end of World War II?

A. Prior to the close of World War II, my facts will not be exact, there were approximately 20 or 22 warehouses in cities throughout California, and if my memory serves me correctly those were broken down into 12 operating division for district [24] offices.

Q. What has happened with respect to facilities since the end of World War II in the Bekins operation?

A. Since the close of World War II there have been the addition of a number of new warehouses, and additions to existing warehouses in some cases, increasing quite substantially our building space available for the storage of household goods. During the same period the company has followed a program of setting up a decentralized organization so that whereas about January 1st, 1946, we had twelve district or division offices; today in California we have nineteen separate division or district offices.

Q. What is the reason for the acquisition or construction of a large number of new warehouses by the Bekins Company since World War II?

A. It has been a policy of the company to attempt to keep up with the constantly growing popu-

(Testimony of Wilbur R. Andreson.)

lation of California, and we have tried to keep abreast of the increase in population in various areas, adding warehouses throughout the State to meet the demand of the increasing population.

Q. I would like to have you tell us a little about the management and organizational structure of the Bekins Company, starting first with the top management group. Can you describe briefly how that is set up?

A. Yes, the top management group is composed of the [25] principal officers and staff, the principal officers being Mr. Milo W. Bekins, president; Mr. Herbert B. Holt, executive vice-president; Mr. Daniel P. Bryant, general manager. In carrying out their top management responsibilities they are assisted by a staff, you might call it an executive staff. As treasurer and controller, I am a member of that staff. In addition we have a personnel director, an assistant controller, a vice-president in charge of sales, a superintendent of the fleet who watches out over our motor equipment, and a general counsel, and one staff member who primarily handles regulatory matters.

Q. Would you describe the management or supervision and structure used by the company for the actual operation of the various districts which you have referred to?

A. Most of the district or division offices are set up on substantially the same organizational basis, which may vary depending on the size of the particular division or district. All of them are

(Testimony of Wilbur R. Andreson.)

supervised and run by a district manager. He will, where the unit is large, have an assistant manager and a superintendent of operations. In addition, he will have various supervisory employees who will head up the storage department, act as the dispatcher, and he will have his own sales force, as well.

Q. What has been the policy of the company with respect to decentralization of the operations at its various locations [26] and districts?

A. I am afraid, Mr. Shaw, that the question isn't clear.

Mr. Shaw: Would you read the question to him, Mr. Reporter?

(Question read by the reporter.)

The Witness: The policy of the company has been to carry the program of decentralization as far as what might be termed practical and economical.

I think that is best represented by the fact that today we have nineteen separate district and division offices.

The Court: Let me ask a question here.

Mr. Shaw: Surely.

The Court: I want to move some goods, we will say. You move goods in interstate commerce, I take it? You move goods to the Middle West?

The Witness: Yes.

The Court: So I look in the phone book and I call Bekins. What listings would you have in the

(Testimony of Wilbur R. Andreson.)

yellow section—various division offices or just the main offices?

The Witness: We would have various division and district offices.

The Court: Supposing I picked your main office and called them, what would you do—refer my call to some district office? [27]

The Witness: No; we might very likely answer the call right there. Although it so happens that our main office is located at the same location as our Figueroa office, so we have a separate sales force right there at 1335 South Figueroa.

The Court: Well, supposing I lived out in the Wilshire district and I was going away for a year and wanted to store my household goods, and I looked in the yellow section of the book and I called your Alameda office, would the Alameda office handle the storage of those goods, or would they be stored over in the Wilshire storage place?

The Witness: In all probability they would be stored over in the Wilshire warehouse. The warehouse nearest your location.

The Court: Who would process the job—Wilshire or Alameda?

The Witness: Well, the order might be taken at Alameda, but it would be routed to the dispatcher who dispatches all of our motor equipment at Los Angeles, at 1335 South Figueroa. They would book the order, as we call it, and the crew would be sent out to pick up your goods and take

(Testimony of Wilbur R. Andreson.)

them from your residence to the Wilshire warehouse.

The Court: In other words, the crew would go out from Wilshire, take my goods to the Wilshire place?

The Witness: I believe there are a couple of crews at [28] Wilshire, but they probably would leave right from 1335 South Figueroa and go direct to your residence.

The Court: As far as I was concerned I wouldn't know at which of the warehouses my goods were stored? Or would I? Would my receipt show?

The Witness: Your receipt would show.

The Court: Would I know prior to the time that I got my receipt where they were going to be stored?

The Witness: Not necessarily, no.

The Court: In other words, customers don't come in and say, "I want my goods stored at Wilshire," or "I want my goods stored at Alameda"?

The Witness: Sometimes they will specifically request that.

The Court: And if they do, you accommodate them?

The Witness: We will accommodate the customer.

The Court: You say you have your own sales force. Do you mean you have salesmen who sell your services to the public?

The Witness: Yes, sir, they are out on the street practically the full day.

(Testimony of Wilbur R. Andreson.)

The Court: And they work out of the district offices?

The Witness: Yes.

The Court: So there is a sales set-up for this East Los Angeles division? [29]

The Witness: Yes, sir, they have a separate sales department, including a sales manager.

The Court: All right. Go ahead.

Q. (By Mr. Shaw): Mr. Andreson, there would be quite a large portion of customers requesting storage services that would not designate a warehouse for the storage of their goods, would there not? A. That is correct.

Q. And is there anyone at Alameda whose duty it is or function it is to accept telephone orders for services of the type that the court has inquired about?

A. Not to my knowledge, Mr. Shaw.

Q. Might it be that in case of such a telephone call that it would be referred to the Figueroa office where the sales force is located?

A. Yes, sir.

Q. In your testimony you have referred to districts and divisions or division, as an organization unit; could you describe in a little more detail why you refer to the East Los Angeles group as a division and other offices you refer to as a district?

A. Yes, sir. The use of the term "division" with regard to the five warehouses constituting the East L. A. Division probably arises out of the historical background.

(Testimony of Wilbur R. Andreson.)

As I recall, all of metropolitan Los Angeles was operated [30] as one operated organization up until about 1938, and I believe sometime around that period Los Angeles was divided into two separate areas, and to keep them clear by terminology they used the titles "East Los Angeles Division" and "West Los Angeles Division."

Q. When was that charged, and what was the effect?

A. Well, I believe the change that I referred to took place in the late '30s, about 1938. So we had two separate autonomous divisions operating in metropolitan Los Angeles.

Q. What became of the West Los Angeles division?

A. The West Los Angeles division was further broken up into decentralized units subsequent to the war. So that today we have several separate district offices replacing what was the West Los Angeles division.

Q. What was the general reason for breaking up that division into smaller units?

A. The primary purpose there was to give a better service to the customers in the adjoining neighborhoods.

Q. Was any consideration given to a similar break-up of the East Los Angeles division?

A. The matter, I am sure, was considered.

Q. What conclusion was reached?

A. The conclusion was reached that Los Angeles

(Testimony of Wilbur R. Andreson.)

by the nature of its operations, by geographical area——

Q. When you say "Los Angeles" what are you referring to? [31]

A. I am referring to the five warehouses now known as "East Los Angeles Division."

Q. You are not referring to the entire metropolitan area of the city? A. No, sir.

Q. There are a number of other districts in other parts of the metropolitan city?

A. That is correct.

Q. Excuse me for interrupting. Go ahead with what you were saying about the reason for not breaking up the East Los Angeles division?

A. I started to mention that there were several factors that would be considered in determining whether this East Los Angeles division could be further decentralized, and they would be the geographical area, what we might term the package of services to be provided by the unit, the revenue potential of the unit in terms of whether it would be sufficient to sustain a profiitable and economic operation.

Q. Well, considering those factors, what was the conclusion that was reached?

A. The conclusion was that it would not be economical to carry the decentralization of the East L. A. division further than its present breakdown, which as now constituted includes five warehouses.

The Court: Do I understand that this East L. A. division, [32] although called a division,

(Testimony of Wilbur R. Andreson.)

operates in generally the same manner as a district?

The Witness: Yes, sir.

The Court: And in giving your count of nineteen districts you counted the East L. A. division as one of those districts?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Shaw): I would like to have you elaborate just a little as to what you meant by the package of services or the nature of the business in the East Los Angeles division, which seems to make it necessary to retain it in its present form as you have just testified.

A. Yes, sir. Any decentralized district office should provide all of the basic services normally furnished by our organization, and those would include, of course, the storage of household goods, the packing and crating of household goods, the selling or booking of long distance shipping, and the provision of transportation of household goods, and each unit must be in a position to provide all of those services.

Now, as to Alameda, under the organization it is not in a position to develop a business to sustain a fleet of equipment at that point. It would not develop enough van line business or other revenue to justify itself as a separate [33] unit.

Q. Would you describe briefly the approach of the Bekins Company to the matter of accounting and financial control over its operations?

A. The accounting system has generally been

(Testimony of Wilbur R. Andreson.)

laid out to conform to the organizational structure of the company. Each of the district or division offices has a relatively complete accounting department which maintains all of the records and financial statements normally produced by an accounting department. As far as top management's position is concerned, we of course are looking to the necessary control, which is furnished in the form of monthly financial statements submitted to our head office for review.

Another measure of control is that provided by the internal audit, wherein internal auditors make at least an annual examination of the accounting records of each district office.

It might make it clearer to state that what the top management is looking to the district management for is the production of results.

Q. Does the company believe in the use of any and all detailed records which might facilitate control and supervision of its operations?

A. Yes, sir.

Q. Would you explain the application of that philosophy [34] to the East Los Angeles division and the Alameda warehouse as to the philosophy of control with respect to those operations?

A. Well, the East Los Angeles division is treated in exactly the same way as all of the other nineteen district offices in California. We receive each month a financial statement from the East Los Angeles division giving us the results of that particu-

(Testimony of Wilbur R. Andreson.)

lar month. Other reports normally required of the other district offices are similarly received.

Q. Do those statements show the operations of the East Los Angeles division as a unit?

A. They show the operations as a unit.

Q. Can you explain whether the management believes it would be desirable to show those operations broken down by the individual warehouses in the East Los Angeles division?

Mr. Duemler: If the court please, I would like to object to the question, this line of questioning, for the reason that there is no issue in the case involved. Plaintiff does not desire any change in their management function, plaintiff has no objection to their organizational structure. The facts have been stipulated as to their structure, and it doesn't seem to prove or disprove the issue in the case as to the exemption question. [35]

The Court: Well, it has been your contention or the contention of your office, Mr. Duemler, that each of the warehouses of the five in the East L. A. division should have kept separate records. Hasn't that been the contention of your department?

Mr. Duemler: No. We have no concern whether they keep separate records or not. We say this: If they want the exemption to apply, and if they will keep certain records entitling them to that exemption, that is their decision. If they do not desire to do it in order to get that exemption, then they must comply with the overtime requirements of the Act.

Mr. Shaw: Your Honor, Mr. Phillips stated

(Testimony of Wilbur R. Andreson.)

that one of the objects of his research was to determine just how the records were kept with respect to the individual warehouses. I don't see how counsel can say his client isn't interested in that subject.

Mr. Duemler: The law requires certain records to be kept.

The Court: Objection overruled.

Mr. Shaw: Would you read the question, please?

(The question referred to was read by the reporter as follows: "Q. Can you explain whether the management believes it would be desirable to show those operations broken down by the individual warehouses in the East Los Angeles division?")

The Witness: Management would not consider it desirable.

Q. (By Mr. Shaw): For what reason?

A. Because basically they are looking to the division or district manager for the accounting—holding him accountable for the results of his entire operation.

Q. Mr. Andreson, is there any complication injected into the accounting operation of the Bekins Company by reason of regulatory agency requirements? A. Yes, sir.

Q. Would you explain what that involves?

A. Yes, sir. We are subject to the Interstate Commerce Commission regulations with respect to application of the uniform system of accounts. The

(Testimony of Wilbur R. Andreson.)

net result of this application is that it requires a considerable number—let me put it this way—it requires more accounts to be maintained; and, secondly, the uniform system of accounts is not directly applicable to our type of operation. That fact has led to a certain complexity in some of our accounting, in other words, as I recall, the uniform system of accounts was primarily originated for railroads and didn't have application directly to motor carriers, and then to complicate it we have on top of that storage activity for which there was no provision made. [37]

Q. Does that have any bearing on either the organization or the units used for your accounting operations?

A. I would say that it probably does, Mr. Shaw. For one thing it means that we have to have somewhat more competent accountants than might be required if we had a somewhat simpler, less bulky type of accounting system.

Q. And could that be more easily provided in a large sized operation through a single administration than breaking it down into more detailed units, as in the case of the East Los Angeles division?

A. It could be more easily provided by the larger unit.

Mr. Shaw: That is all of the questions, your Honor, of Mr. Andreson.

(Testimony of Wilbur R. Andreson.)

Cross-Examination

By Mr. Duemler:

Q. Mr. Andreson, are you familiar with the operation of chain organizations, generally, other than the Bekins organization?

A. I doubt if I am, Mr. Duemler.

Q. Do you know of any respect in which the Bekins organizational structure differs from chain organizations generally?

A. Unfortunately I am not in a position to answer that question, because I am not sufficiently familiar with chain [38] organizations to know their organizational set-up and the methods by which they obtain their results.

Q. So far as you know, all big chains may operate in similar fashion to Bekins, then?

Mr. Shaw: Your Honor——

The Court: He says he doesn't know. Objection sustained.

Mr. Duemler: I will withdraw the question.

Q. (By Mr. Duemler): You testified that if a person went to the Alameda warehouse and wanted to transact business, that he might be referred to the Figueroa warehouse. Would you know definitely whether or not customers are so referred, or if they take their orders at the Alameda warehouse?

A. Well, I am not intimately connected with East L. A., I know there are times when they are referred, and then there are also times, Mr. Duemler,

(Testimony of Wilbur R. Andreson.)

when customers are accommodated right at Alameda.

Q. In other words, if I went to Alameda, as I may have done just last week, and said, "I have some storage, can I make a deal here," I may very well have been told, "Yes, what is your deal"?

A. They would prepare an order for service for you.

Q. Some of the warehouses emphasize different types of activity, is that correct? In other words, the Navy work that you have done was handled in one or two of the warehouses, [39] and not the others? Or do you know that?

A. Well, yes, it was handled in one or two. But I think even more than that, it is dependent upon the particular contract and where we have had the contract.

Q. What I had reference to particularly was the East Los Angeles division. A. Yes, sir.

Q. That was the South Grand warehouse that took the incoming goods and the Alameda the outgoing goods, is that correct?

A. As to a portion of the service rendered under the contract, yes.

Q. Under the Navy contract? A. Yes, sir.

The Court: You are talking now about a Navy contract?

Mr. Duemler: Yes.

Q. (By Mr. Duemler): Is furniture on display and sold at the Alameda warehouse, do you know?

A. No, sir.

Q. When I hear these commercials over the air,

(Testimony of Wilbur R. Andreson.)

to go to the Crenshaw address to buy my furniture, I could go right in there and buy a sofa or a dining room set, I wouldn't be referred to the division office, would I?

A. No, you would go right to the furniture store.

The Court: Out of the five is Alameda the only one that [40] doesn't sell furniture?

The Witness: No, sir. Of the five, there are three which don't sell furniture as advertised in the way in which Mr. Duemler stated it.

Q. (By Mr. Duemler): Where is the rug-cleaning done?

A. Rug-cleaning is done at what we call the West Hollywood warehouse out on Santa Monica Boulevard.

Q. In other words, in the East Los Angeles division there is no establishment that does that type of work?

A. Not the actual rug-cleaning itself, no, sir.

Q. I note on Plaintiff's Exhibit 1 the sign on the Wilshire location, "Furniture Sales Division"; do you have a separate division for furniture sales?

A. That is a leased operation, Mr. Duemler, operated by a tenant who conducts the furniture sales division, using the Bekins name, and operating at two locations, namely, Crenshaw and Wilshire. I refer to the Wilshire warehouse as being 116 South Western Avenue.

Q. Do you know if there is a reason, location or otherwise, for the commercial warehousing being concentrated at Alameda, more than elsewhere?

(Testimony of Wilbur R. Andreson.)

A. I imagine Mr. Elliott, who will probably testify, knows more about that than I do.

Q. All right, sir.

I think that is all of this witness. [41]

Mr. Shaw: I have two or three questions.

Redirect Examination

By Mr. Shaw:

Q. Mr. Duemler gave an illustration of himself going to the Alameda warehouse to seek storage services. Could you express an opinion as to how frequently, compared to the total volume, customers would go to Alameda seeking storage services, total volume of the East Los Angeles division?

A. That would happen very infrequently, and I think it could be well understood when you realize that Alameda is in the heart of the industrial area of Los Angeles, and customers concerned with storage problems generally will seek out one pretty near their residence, as a general rule.

Q. Mr. Duemler asked you about a Navy contract with which you seem to be familiar. Will you state when performance under that contract was completed?

A. The dates have slipped me, Mr. Shaw. I think it is better than two years ago June 30th, or maybe it is three.

Q. It was some time ago?

A. It was some time ago that we had the Navy contract.

(Testimony of Wilbur R. Andreson.)

Q. Is there any comparable contract now being performed in the East Los Angeles division by Bekins? A. No, sir.

Q. Your reply to the court about the locations at which [42] furniture is sold might not have been entirely clear. You mentioned or made some reference to three warehouses at which no furniture in the sense mentioned by Mr. Duemler is sold; is there any furniture sold in any other sense or way, and if so will you describe it?

A. Yes, sir, I did qualify it for the reason that there are occasional instances where a customer desires his furniture to be sold and will give Bekins a bill of sale asking that we obtain bids on that furniture. As a consequence, we might have occasional lots in any warehouse which might be put up for sale.

Q. That is in periodic auction sales, too?

A. This would be separate from periodic auction sales.

Q. Are there auction sales held, also, at intervals?

A. There are. Generally about once a year.

Q. You made an answer to Mr. Duemler about rug-cleaning activities. Are rug-cleaning services sold by the East Los Angeles division?

A. Yes, sir, they are.

Q. Just briefly how is that handled?

A. Well, generally speaking the sales representatives are encouraged to inquire of the customer regarding the need or possible need for rug-cleaning

(Testimony of Wilbur R. Andreson.)

at the same time that we are obtaining an order to transport their furniture or to store it, and quite frequently we are successful and the [43] salesmen will arrange for the rug-cleaning at the time that he handles the order for the service desired by the customer.

Mr. Shaw: That is all.

Mr. Duemler: No further questions.

The Court: Thank you, sir. You may step down. We will take a short recess.

(A recess was taken.)

Mr. Shaw: I would like to call Mr. Erxleben as a witness.

LLOYD W. A. ERXLEBEN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Shaw:

Q. Will you please give your name and spell it for the reporter?

A. Lloyd W. A. Erxleben, E-r-x-l-e-b-e-n.

Q. Would you state your place of residence?

A. 777 Florecita Lane in Altadena.

Q. What is your position, Mr. Erxleben?

A. I am personnel director for the Bekins Company.

(Testimony of Lloyd W. A. Erxleben.)

Q. Would you outline briefly what your duties are in that connection?

A. Very generally they have to do with assisting in establishing personnel practices and procedures, and also in [44] handling union negotiations.

Q. Would you state briefly the history of your employment career?

A. With the Bekins organization?

Q. No. Before and during.

A. Prior to coming to work for the Bekins organization I worked jointly for the Teamsters and the Motor Truck Association in managing a drivers' safety center, which was a joint management-labor venture.

Q. And how long have you been with the Bekins Company?

A. Five years, a little over five years.

Q. During that time have your duties been about what you have just described?

A. Yes.

Q. In connection with your work do you have occasion to have dealings with the Teamsters' union? A. Yes, I do.

Q. Do you have occasion to form an opinion as to the strength and the character of the Teamsters' union as a labor union?

A. Very definitely, not only from my associations with them in negotiations, and in handling grievances and labor problems, but also I am interested, I try to follow the organization as much as

(Testimony of Lloyd W. A. Erxleben.)

I can, since I have to deal with them, I do such things as hear Dave Beck speak, and that sort [45] of thing.

Q. What is your opinion as to the strength and the character of the Teamsters' Union?

A. My opinion is that they are one of the strongest, if not the strongest in the country; that they have more power, as such, than any other union in the country. I have often heard, and believe, that the potential is pretty terrific when you think what might happen if a general strike were called.

Q. By the Teamsters' union?

A. By the Teamsters.

Q. Do you find in your negotiations with the Teamsters' union for Bekins that their representatives are familiar with the operating problems of Bekins?

A. Yes, I do. Their representatives that we deal with visit our plants quite regularly, early in the morning, to talk with the men, and also with our managers and superintendents. Some of the officials we deal with actually have been previous employees, have worked in the industry.

Q. Do you find occasion in your work to make studies of the wage structure of Bekins as compared to others in the same and similar industries?

A. Yes, I do.

Q. Would you state whether or not the wage structure as now being paid by the Bekins Company to its drivers and [46] helpers and warehousemen is comparable to that being paid in similar indus-

(Testimony of Lloyd W. A. Erxleben.)

tries on its present basis with no Saturday overtime?

Mr. Duemler: I will object to the question on the ground that it is immaterial to any issue in the case; and, secondly, because it refers to Saturday overtime as though there was some significance to Saturday in the application of the Fair Labor Standards Act.

The Court: I will sustain the objection on the first ground.

Q. (By Mr. Shaw): Do you have occasion, Mr. Erxleben, to investigate the preferences of the employees of the Bekins Company with respect to pay practices and methods from time to time?

A. Yes, I do. We have a confidential, anonymous attitude survey, which I conduct at various branches from time to time.

Q. Can you state your findings from that work as to the preference of the Bekins operating employees with respect to a six-day work week with no overtime for the sixth day, as compared to a five-day work week with no sixth day work?

Mr. Duemler: I object to the question as being immaterial. It is immaterial what employees desire with respect to a sixth day.

The Court: Sustained. [47]

Mr. Shaw: Your Honor, the only reason for these questions—I agree that they are perhaps a little remote, and yet I think this court has full authority in arriving at an interpretation of the statute to consider the effects of various alternative

(Testimony of Lloyd W. A. Erxleben.)

interpretations from a practical and equitable standpoint, and these questions are directed towards the court's discretion in arriving at a reasonable interpretation of the statutory provisions, and that is the only reason for these questions.

If the court would reconsider, I feel that the last question was relevant in that respect.

The Court: I think I can consider all the circumstances about this business and how it is conducted, but I don't think the preferences of the employees have anything to do with the Wages and Hours statute.

Mr. Shaw: My next question has to do with the direct and practical consequence of the plaintiff's view of the case, namely, this question: What would be the effect upon the morale and personnel relations of Bekins with its operating employees of being required to and paying overtime for a sixth day's work at one of its numerous warehouses?

Mr. Duemler: The same objection.

The Court: I know what the answer is going to be. You are going to talk about this Saturday work.

Mr. Shaw: Not precisely, your Honor. I hope that the [48] answer is in terms of the fact that it would present an almost impossible personnel relations problem due to the obvious result that all employees would want to work at the one location.

The Court: Objection overruled.

Mr. Shaw: Do you want the question reread, Mr. Erxleben?

(Testimony of Lloyd W. A. Erxleben.)

The Witness: I think I have it. There would be two problems involved. First of all, we couldn't do it without renegotiating the contract——

Mr. Shaw: Would you read the question to the witness again, please?

> (The question referred to was read by the reporter as follows: "Mr. Shaw: My next question has to do with the direct and practical consequence of the plaintiff's view of the case, namely, this question: What would be the effect upon the morale and personnel relations of Bekins with its operating employees of being required to and paying overtime for a sixth day's work at one of its numerous warehouses?")

The Witness: It would be a problem for the simple reason that East L. A. is operated as a unit and personnel are transferred from location to location as the requirements of the [49] jobs demand. The end result would be that everybody would want to work on Saturday at Alameda and draw overtime, I would suppose, and we would have the problem of seniority and who would and who wouldn't. It would be rather tough to do in that unit in the East L. A. division.

Q. (By Mr. Shaw): As an alternative to that possibility, would it be possible to close down a warehouse at which it became required that overtime be paid on a sixth day for the sixth day's

(Testimony of Lloyd W. A. Erxleben.)

work and close down on the sixth day and not work that day?

Mr. Duemler: If the court please, again I desire to object. There is no sixth day question involved in this case whatsoever. The law requires time and one-half after forty hours, if equitable, and that may be met in a number of different ways without making a sixth day question out of it.

Mr. Shaw: The thing that the plaintiff is objecting to is the present practice of working on the sixth day without paying overtime, and that is what this question is directed to. If we weren't doing that, you wouldn't be here in this court, I presume.

Mr. Duemler: If you worked forty hours in two days we would be here just exactly as if you spread it out over six days.

The Court: Mr. Duemler is correct. You can reframe [50] your question if you will, please.

Q. (By Mr. Shaw): Would it be practical to operate one of the numerous Bekins warehouses on a forty-hour week, with no additional work being performed and being paid for at an overtime rate beyond forty hours?

A. Under the present conditions it would be impossible. There is a clause in our union contract which stipulates that if we reduce the normal six-day work week the contract must be renegotiated. I don't know exactly how it is worded.

Mr. Duemler: I would like to object to the answer and ask that it be stricken from the record, because the contract is in evidence and it speaks

(Testimony of Lloyd W. A. Erxleben.)

for itself, and the contract, contrary to what the witness testified to, provides exactly the opposite. It is in evidence and speaks for itself.

Mr. Shaw: Your Honor, it is immaterial to me——

The Court: Overruled. There is no harm. I will look at the contract.

Mr. Shaw: I will just refer the court to Section 14 of Exhibit A to the stipulation, which does specify that if the work week is reduced to less than 48 hours, that it is necessary to renegotiate the contract. And the court can draw its own conclusions as to the effect of that.

Mr. Duemler: If the court will read Section 19 with that.

Mr. Shaw: I have no further questions of this witness. [51]

Mr. Duemler: No cross-examination.

The Court: Thank you, sir. You may step down.

Mr. Shaw: I would like to call Mr. Schmidt to the witness stand.

JOHN SCHMIDT

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Shaw:

Q. Will you state your full name and residence address, Mr. Schmidt?

A. John Schmidt, 6685 Atoll Avenue, North Hollywood.

Q. Would you state your position of employment?

A. I am assistant controller, Bekins Van & Storage Company.

Q. What, briefly, are your duties in that connection?

A. Well, I am Mr. Andreson's assistant, whereas his responsibility as far as accounting and taxes and auditing are general, mine are specific.

Q. How long have you been employed in that capacity by Bekins?

A. A little over six years.

Q. Are you familiar with the details of the accounting and record-keeping system and practice of the East Los Angeles [52] Division of Bekins?

A. I am.

Q. Will you state whether or not the accounting records for the East Los Angeles Division are maintained as a unit for the operations of all of its warehouses?

(Testimony of John Schmidt.)

A. They are maintained as a unit for all of the five buildings in the East Los Angeles division.

Q. Will you describe very briefly the accounting personnel who perform that work for the East Los Angeles division?

A. There are seven in number. There is a chief accountant and his assistant accounting clerks and bookkeepers.

Q. Can you state why the records are maintained for the division as a unit rather than to be maintained separately for each of the warehouses in the East Los Angeles division?

A. The Figueroa office is the headquarters of the East Los Angeles division, and of course that is where the books are kept. When we speak of books, we talk about the books of the East Los Angeles units. If we were to keep any records for any of the individual warehouses it would take more accounting personnel and it would be prohibitive cost-wise.

Q. Do you have an opinion as to how much greater either the number of people or the cost would be than the present organization for that purpose? [53]

A. It would depend on how the books were kept. If the buildings were broken off into district offices, such as other districts we have, then the books would have to be kept at those locations, and we would have to have almost twice as many accounting people as we have now. If we kept separate sets of books for each building at the Figueroa office,

(Testimony of John Schmidt.)

it would probably take about fifty per cent more personnel than we now have.

Q. And would the cost of such operations be about comparable to the increase in the number of personnel that you mentioned?

Q. You mean the clerical cost?

Q. The increase in cost.

A. The increase in clerical cost, yes, it would be fifty per cent or 100 per cent, as the case might be. Except that if the books were kept at each warehouse, why, there are other costs incident to having separate organizations at an individual warehouse, which would be beyond merely the accounting.

Q. Are you familiar with the type of statements and reports which are prepared for the East Los Angeles division? A. I am.

Q. Are those statements and reports prepared for the division as a unit or for the respective individual warehouses [54] in the division?

A. They are prepared for the division as a unit only.

Q. Does that conform to the practice of the other districts of the Bekins Company, even though the others may have more than one warehouse within them?

A. Yes, it is identical to all of the other eighteen districts in the California company.

Q. In other words, the same reporting procedure and practice is used entirely for the East Los Angeles division as for the other districts of Bekins?

(Testimony of John Schmidt.)

A. Yes, we have a preprinted statement which applies to all of the districts.

Q. Can you state what bank accounts are maintained for the operations of the East Los Angeles division or any of its warehouses?

A. There are two bank accounts operated for the East Los Angeles division. It is a commercial account and a pay roll account, and those are the only two for serving that area.

Q. There is no account of any kind maintained for the Alameda warehouse as such?

A. None, whatsoever.

Q. Are you familiar with the handling of the pay roll for the East Los Angeles division, and if so, would you state how that is handled? [55]

A. Yes, I am familiar with it, and it is handled in the accounting headquarters at the Figueroa address. All of the time cards of the various employees, regardless of where they are employed within the division, flow into the superintendent of operations whose headquarters is at the Figueroa office, and after he has approved them they go to the paymaster in the accounting department and the pay rolls are processed there.

Q. And all of that is handled for the division as a whole and none of it for any of the individual warehouses as a separate operation?

A. That is true. It would be rather impractical to break the pay roll down on a warehouse basis, because many of the employees work back and forth between one operation and another, and the pay-

(Testimony of John Schmidt.)

master couldn't assign any one employee to any one warehouse.

Mr. Shaw: I have no more questions of this witness, your Honor.

Cross-Examination

By Mr. Duemler:

Q. Mr. Schmidt, are you acquainted with the organizational structure of chain organizations generally?

A. I am acquainted with some organizational structures. I don't know whether they pertain to your term of chain organizations. [56]

Q. Do you know of any respect in which the organizational structure at Bekins is fundamentally different from the organizational structure of chain organizations generally?

A. I don't know, but I would say that it is different, and I say this on the basis that I know of accounting systems for various types of businesses, and I know a little bit about chain store accounting. I would say that Bekins is not exactly a chain store. In fact, it is far from a chain store, and therefore I believe that the accounting would be entirely different.

Q. Why is it in your opinion not a chain store, as you put it?

A. Well, each of our organizations is set up on a basis of a going business all by itself, and there is hardly any chain relationship between one office to

(Testimony of John Schmidt.)

another, or to the corporation. When I think of chains I think of super-markets or super-drug-stores, and I know for a fact in some instances that there are no books kept—I mean a full set of books kept at individual drug stores and individual super-markets, and in each one of our districts we have a full set of books which enables the top management of the company to hold that particular district manager fully accountable for whatever his operation is.

The Court: Let me ask you a question. If you can't answer [57] it don't try to, and maybe someone else can answer it.

What, if anything, would keep Bekins from taking these five warehouses that headquarter at Figueroa Street, and consolidating the warehouses and the central office into one location somewhere in the area served by the five warehouses?

The Witness: Well, they are so now consolidated, if I understand your question correctly.

The Court: Why hasn't that been done, or why could it be done?

The Witness: I am sorry, sir. Do you mean why haven't we taken the five offices or these five buildings and made separate offices out of them?

The Court: No. Why, instead of having five warehouses scattered around in central L. A., what you call the East L. A. district, why don't you have one big warehouse down on Figueroa Street? Do you know the answer to that? If you don't know, don't try to answer it. It is a question probably

(Testimony of John Schmidt.)

that should be directed to some executive. You are one of them.

The Witness: It would seem to me rather logical that as a business grows it expands according to the markets that it has. At one time our Alameda property was a going business, years ago in Los Angeles. And then we acquired another piece of property, which it was good business to acquire, and [58] which enabled us to serve our customers better. And of course the thing kept going that way all the time. It would be very difficult to imagine ahead of time just what your needs in five or ten years would be, and then to get yourself the real estate which would accommodate your needs that far ahead.

The Court: I don't want to lead you, but let me see if I understand your answer: In other words, for one thing Bekins buys or leases property for warehouses and tries to get a good deal, I suppose.

The Witness: That is good business.

The Court: Accordingly, if you needed additional space to a central warehouse, such as I suggested, and the fellow selling it wanted a thousand dollars a front foot, and if you could move a mile away and get it for $50 a front foot, you would probably move a mile away and take it, is that it?

The Witness: That is the answer, sir.

The Court: Or if you were established in a central warehouse and had the problem of consolidating existing warehouses, such as the five in the East L. A. district, with the big one, I suppose it would

(Testimony of John Schmidt.)

be very expensive and difficult to get sufficient space at any one of the five locations to accommodate your total need; is that right?

The Witness: My knowledge of the area that we are in now, or any of the areas in which we operate, would be that it [59] would be very, very expensive. In fact, it would be prohibitive.

The Court: In other words, you are running a business in a metropolitan center, and not in a cow pasture?

The Witness: That is right.

The Court: If you were out in a hundred-acre field and needed additional footage, you wouldn't have any problem, you could buy it or build it?

The Witness: Yes.

The Court: But in a metropolitan area you have to consider values of real property for leasing or for purchase?

The Witness: Yes, sir.

The Court: All right. Go ahead.

Q. (By Mr. Duemler): From your knowledge of chain stores, you say you have some knowledge of grocery chains——

A. Limited knowledge of accounting, Mr. Duemler.

The Court: He has limited his knowledge to something about accounting practices.

Q. (By Mr. Duemler): Isn't the most distinctive characteristic of chain organizations the fact that it has central management?

(Testimony of John Schmidt.)

A. That is true.

Mr. Duemler: I think that is all. [60]

Redirect Examination

By Mr. Shaw:

Q. With respect to that last question of Mr. Duemler's, how would you relate his observation about central management to the Bekins Company? Does the Bekins Company have central management?

A. If I may answer by comparison, I would say that—comparison to a chain store illustration—I would say that Bekins has perhaps 25 per cent central management and 75 per cent decentralized management. The 75 per cent exists right on the situs where the besiness is operated, and is vested in the local district manager.

Q. With respect to the Court's question concerning the posibility of carrying on the business of the East Los Angeles division in a single, very large building, if that were done would the functions of warehousing, moving, sales, dispatching and all of the other activities be handled in approximately the same manner that they are now handled in five locations, in your opinion?

A. Yes, except geographically.

Q. The only difference would be the factors of physical movement which are required by the separate locations as compared to one location, is that correct?

(Testimony of John Schmidt.)

A. I can see no reason to handle it differently under one building than the way it is handled now. In fact, it is [61] handled under one building except for the geographic distance between these five locations.

Mr. Shaw: That is all.

Mr. Duemler: Just one further question. Did your Honor want to ask a question.?

The Court: Go ahead.

Recross-Examination

By Mr. Duemler:

Q. Mr. Shaw asked you about central management with respect to Bekins. Now, involved in this law suit is the East Los Angeles division; in what respect would the central management of this East Los Angeles division differ from any other chain store central management?

Mr. Shaw: Your Honor, I took it that Mr. Schmidt in referring to central management, pursuant to Mr. Duemler's request, was speaking of a company which had central management, not the management of a particular unit or division, and therefore I would say that it would be impossible to answer the present question in which counsel has now shifted his term to another application and meaning.

Mr. Duemler: The defense in this case is that the East Los Angeles division has a central management and is a single unit. Now, I am asking this

(Testimony of John Schmidt.)

witness how does that central management differ from the central management of any chain?

The Court: First of all, it is not proper cross-examination, [62] if Mr. Shaw wants to be technical. He didn't go into this on direct.

Secondly, the witness has disclaimed any knowledge of chain store operation except on certain accounting practices, not management. You are therefore questioning the witness about something that he has told you he knows nothing about. If you press it, I will let him answer it, but obviously I am not going to give any weight to a statement of opinion from a witness who says he knows nothing about it.

Mr. Duemler: I am sorry, your Honor. I intended to limit it to the centralizing of accounting practices. I probably didn't do that. I want to limit it to the thing that the witness did say he was familiar with.

The Court: All right. Ask it in that form.

Q. (By Mr. Duemler): In that respect, would the centralized accounting practices in this East Los Angeles district differ from the centralized accounting practices in other chains with which you are familiar?

Mr. Shaw: Your Honor, again I can't understand the sudden shift in the use of "centralized" as meaning—as formerly it meant central in the whole company, and now all of a sudden it means out to the one district unit, and he has shifted his terms in a way which makes it pretty hard for the

(Testimony of John Schmidt.)

witness to answer this question consistent with his answers to the previous questions where "central" meant something [63] entirely different, and I object to the question on that ground.

The Court: It is not going to help me, because your question dealt with something beyond which the witness said that he was familiar with. He said he knew something about accounting practices or techniques in some chains.

Mr. Duemler: I am sorry if I misunderstood about involving the entire Bekins Company. Frankly, I know very little except what is in our stipulation about that and have no intention of going into it, but as I understand the issues here, these five warehouses are not five separate establishments, according the the theory of the defense, because of the centralized accounting and banking practices. Now, this witness has testified to such centralized accounting and banking practices, and I have asked him if he is familiar with other groups of establishments, other chains, and he said so far as accounting is concerned. And I am merely asking——

The Court: Ask your question again.

Q. (By Mr. Duemler): If you know, what is the difference between the centralized accounting practices in the East Los Angeles division of Bekins from the centralized accounting practices of any other chains with which you are familiar?

The Court: Mr. Duemler, the question is bad, first of all, because it infers that this is a chain. You can't club [64] the witness into making an ad-

(Testimony of John Schmidt.)

mission like that. You say "of other chains," and inferentially you mean this is a chain. The defendant does not concede that. They say this is one establishment.

Mr. Duemler: I am sorry if I used the word "other."

May I ask the question as to the difference between the group of five warehouses in the East Los Angeles division and any centralized accounting systems in chain organizations with which you may be familiar?

Mr. Shaw: Your Honor, I object to that question for the same ground that I have been objecting, that it seems to me counsel is using the word "centralized" in a manner that is so confusing that I don't understand what he is talking about and I wonder if the witness does.

The Court: I think the witness does. We will see. If the witness doesn't, we will strike his answer.

The Witness: I can think of—there are probably several reasons, if I could think them all out, but the principal one that occurs to me is the fact that in chain store operations the cash is usually collected or sought by the employees on the situs of the business operation. In our East Los Angeles division all money is requested to be sent from our customers to our main accounting office. And that would seem to me to be a major difference, around that all the accounting centers. And of course if there is no [65] money there is no accounting.

(Testimony of John Schmidt.)

Q. (By Mr. Duemler): And that is the essential difference, as you understand it?

A. One that would occur to me at the moment.

Mr. Duemler: I think that is all.

Mr. Shaw: No more questions.

The Court: Let me ask this, if you know; if not, let someone else answer it.

Do you own the ground where the Wilshire store is located, or lease it?

The Witness: We lease it.

The Court: When did the company acquire that lease, first?

The Witness: I am not acquainted with that date.

The Court: What about Grand Avenue, do you lease or own it?

The Witness: We own it.

The Court: Do you know when that was acquired?

The Witness: No, sir, I do not.

The Court: Crenshaw?

The Witness: We own it, but I am not familiar with the date.

The Court: Figueroa Street?

The Witness: We own it.

The Court: You don't know the date, [66] either?

The Witness: No.

The Court: And East L. A.?

The Witness: That would be Figueroa—do you mean Alameda?

(Testimony of John Schmidt.)

The Court: I mean Alameda.

The Witness: We own that.

Mr. Shaw: Your Honor, I am sure Mr. Elliott, who will follow, can answer the question as to the dates.

The Court: All right. You may step down.

* * *

The Court: I would prefer to have it go over, because I would like to do some more thinking about it. I want you to be thinking about one question, both of you. I don't know whether I have it formulated in my mind sufficiently to convey it to you. I will try.

Assume for argument that the evidence shows here that Bekins is running these five warehouses or places of business as one establishment. Certainly it seems to me that whether [67] an enterprise of that sort is one establishment or five should not wholly depend on the will of the company. Otherwise, if that was the way the law could be applied, a company could go out—we will say a company should legitimately be under the Wage and Hour Act—and by the way it operated its business could automatically remove itself from the effect of the statute. True, there are various statutes which a company may legitimately avoid by the way it operates its business, I don't think we can draw any general conclusions there, just as a businessman might, by his accounting methods, diminish or cut the tax he pays and do it legitimately. But that problem is giving me a little concern. If this differ-

entiation between the one establishment comprising all five warehouses, or Alameda as a separate establishment, hinges entirely on the way the company has elected to operate its business, query—is that a problem or not?

This is a rather inchoate idea.

Mr. Shaw: I follow the Court's thought. In fact, I have had the same thought, not quite as articulately expressed in my own mind, and it is for that reason we have had a considerable amount of testimony indicating that this is by a great deal a more effective and efficient way to operate than the alternative which seems to be available.

It seems to me that perhaps the rule must be that if the employer is operating in a particular way which he can [68] demonstrate is the most reasonable and perhaps the only reasonable way to operate, that that is sufficient and they needn't be forced to go to a different method which is less efficient and more costly, and so on.

There will be some further testimony on that line tomorrow morning.

The Court: That may be the answer.

As a matter of fact, that is what I was thinking about when I inquired about the acquisition of space in one location. Certainly in a large metropolitan area it would be a silly situation to insist that a company that was expanding put all its eggs in one basket and buy, we will say, a tremendously valuable property on a street for storage purposes, when it could go two or three blocks away or a mile away and get cheaper property.

Again, that fits in with what you are talking about, the reasonableness of the operation.

Mr. Shaw: I think that was the reason for the decision in the Burhans case where the Montgomery Ward Company had to go down the street a mile to get a warehouse to serve its retail outlet. As I mention in the memorandum, if they had to go to four little storerooms within a mile of each other instead of one other one, I think the Court would have reached the same conclusion. I think that is the rationale that should be applied here. [69]

Mr. Duemler: I think, if the Court please, on that point I would like to say, first, that the Government has no desire to dictate to this defendant as to how he should operate, as to where he should operate, whether he should have one or ten buildings, or whether he should centralize or not centralize. And some of the questions and answers seem to me to infer that the Government is trying in some way to dictate this defendant's policies, whereas our only concern in this case is to require an additional half time after forty hours, if the law applies to a certain establishment.

All the decisions remain with the defendant.

With respect to the Burhans theory——

The Court: Let's not argue it now. I am just giving you something to think about tomorrow, and maybe help me then.

Another thing. I was interested in the dates when these properties were acquired. Query, whether that is a factor. In other words, here is a company which grew up, we will say, like Topsy, as most businesses

grow. When the business was conceived there was no thought, probably, at that time that the business would be as big as it is now.

Mr. Shaw: Your Honor, with the exception of one of them they have all been owned or used for over twenty-five years, which would be an answer to your question. [70]

The Court: Assuming that the evidence shows that they have all been owned for twenty-five years, here is a company with these valuable properties, leases or fees, in the metropolitan center of the city —is the company entitled to take these four or five warehouses and set up a division and say, "This is one establishment, we will run it from a central location," or merely because of the geographical distances between them is the company going to be compelled, in order to comply with a Federal law, to say, "This place is miles away, and we are going to have to make it a separate establishment, we are going to have to put in a manager and chief auditor, and set up a separate division, because it is three miles away"?

It seems to me a company is entitled to take what property it has, when a new statute comes along, and take a reasonable approach to it.

Would you be arguing, Mr. Duemler, with equal vigor if these five warehouses were all across the street or alley from Figueroa Street?

Mr. Duemler: Across an alley may create a problem. There are some cases——

The Court: Let's say across the street.

Mr. Duemler: If they were across the street, and

in the next block, and so on, where each establishment operates a business, I think under the language of the decisions it would [71] be necessary to hold that each is an establishment. In the Burhans case, if one is an auxiliary or incidental part of the other store, like in the Burhans case you have a warehouse through which goods are funneled into a single store, and there is no reason to believe—we have in our interpretations agreed fully with the theory of that case, our only difference here is that we are not dealing with a separate warehouse supplying a central retail store, we are dealing with seperate businesses, separate locations, where they are conducting their own business. They are actually doing the servicing and selling the goods at the other locations.

The Court: Well, it is obvious that each case has to be decided on its own facts. You can take an automobile repair shop that had under one roof a valve-grinding department, and across an alley it washed automobiles, and a block away it had a paint shop, and down on another street it had a place where you took care of tires, and all that sort of thing, you wouldn't seriously argue that each one of those places, because they were under separate roofs and geographically removed, was a separate place of business, would you?

Mr. Duemler: I would like to have your Honor read the W. E. Wright case cited in my memorandum, which is a case that I am familiar with because I tried it. It is a case where a single business in Akron, Ohio, began to expand, and it developed over the years, as a remark was made here, like [72]

Topsy, just grew, to where they had this central hardware store, retail store, with a warehouse to the rear of it, and they had another yard which essentially was a coal yard, another yard which was essentially a building materials yard, all in Akron, and then they had another across town, another establishment that had a small retail store in connection with it, and this main retail store had the general office upstairs, and I tried that case before Judge Jones in Cleveland, and he found that it was a single establishment, that it started out as a retail store and spread out into these five locations around town, and it was a retail establishment, and the Sixth Circuit reversed it and certiorari was denied.

The Court: There are other facts. There was the question of how books were kept, whether money was collected at the coal yard, whether there were salesmen there operating, the manager of that store, each of these things has to be decided on all the facts. I wouldn't have much quarrel with that, particularly if you went ahead and the facts showed that these were separate, little retail businesses.

Mr. Duemler, you know I think very highly of you, you always energetically press your cases, but, you know, I am sadly disappointed. I have listened to all the talk about how the new administration was going to get the administrative agencies down to business, and here I find them worrying [73] about ten employees who are members of the Teamsters' union, and the Court will take judicial notice of the status of the Teamsters' union—I used to do some

labor work, I never represented the Teamsters, but I know something about them—ten employes they are trying to bring within the Wage and Hour Act.

I don't know. I shouldn't comment, because I don't know what other business your department has pending, I know some of the cases are closed by consent decrees, but it is certainly a disillusionment for me to find an administrative agency straining to extend the coverage of this Act over these ten employees.

I believe in the Wage and Hour law, I believe in the rights of labor to get fair compensation, and I think it is good for the economy that workingmen get good wages, because they spend what they get; when you start to curtail wages, then you start to curtail purchasing power, and you are in economic trouble, and I certainly am not a follower of the philosophy of Herbert Hoover; but why a storage company that happens to have five warehouses can't set up a business in the central area of Los Angeles, right around the heart of the city, and say, "This is one division, we are going to run it as one establishment," without running afoul of the statute, is pretty hard for me to see.

Mr. Duemler: That doesn't run afoul of the statute. [74]

The Court: Without subjecting one warehouse of the five to the effects of the Wage and Hour statute.

Mr. Duemler: Might I ask your Honor what you thought it would be if they started a little shoe factory up the street?

The Court: They haven't done that yet. Let's not get into that.

Mr. Duemler: I think there could be little difference between a little shoe factory and a little commercial warehouse.

Mr. Shaw: It is not a little commercial warehouse.

The Court: So far the evidence shows that all the activities of the company are related to essentially the business of transporting and storage of merchandise, and the testimony shows that the major part of it is household.

The cleaning of rugs is a natural in connection with the storage of that matter. The selling of furniture would certainly be a natural—I take notice of the fact that this company has the right of a storage lien given it by California State law, if people don't pay their storage bills the company has a right to acquire, or, rather, to sell that property, and probably very often acquires it by virtue of its lien. And it is going to have to legally dispose of that property. Whether it does it by calling in a wholesaler to buy a lot, or whether it holds a public [75] auction, whether it puts it in a display room, it still looks to me like the selling of furniture is tied in with the transporting and storing of household goods.

Mr. Duemler: All of which we recognize as retail. There has been no testimony, but we have stipulated that the Alameda warehouse cannot meet the tests. And the reason is the nature of their business there. They have commercial companies——

The Court: Don't you know——

Mr. Shaw: Your Honor, there is no evidence on what Mr. Duemler is saying. There is a little bit

too much commercial goods there to be 25 per cent. A little beyond that. Whereas if the group is viewed as a whole, it is considerably below that. That is all he is saying. This isn't a commercial warehouse.

The Court: I shouldn't say this, I don't know what your agency does. I know when you dealt with me as United States Attorney, your agency, we occasionally had a matter or two—I shouldn't say this, but I can recall, I don't know how the situation is now, but I can recall in some industries, such as the garment industry, in the old days where a girl would be told to not punch a clock on a certain day, just punch the clock two days this week, dearie, so the card will show you only worked so many hours. She would go down and work all week, and the clock would show two days, and when she got her pittance there was the answer. I suppose that has all [76] been cured.

Mr. Duemler: We still have them.

The Court: I suppose that has all been cured.

Mr. Duemler: No, it hasn't. We still have cases pending right today involving identically the same thing. And this civil type of action is one that is not aimed at the same exploiting, chiseling methods, but in an injunction suit such as this, I might say that the administrator is charged with the responsibility of having lines drawn, and in this case there is an issue as to the meaning of the word "establishment." And it is not to be applied only to the defendant here. There are dozens of chains of warehouses around the country. And the fact that this is the

only one where the isue is raised is not necessarily of our choosing.

Mr. Shaw: I would like to just mention to the Court that in a fourteen-page, single-spaced letter practically everything that has now been presented to the Court on the facts and law was presented to the administrator, so the administrator was not without knowledge of both the facts and the practical consequences, and the possible interpretation of the law here, before this proceeding was started.

The Court: We will take it up tomorrow morning. And if this administrator is under pressure to demark these lines, maybe we will help him out tomorrow.

Mr. Shaw: Your Honor, I strongly doubt whether there is [77] any other situation in the United States to which this situation could be applied, because there are no companies comparable to Bekins Company.

Our industry is a one-warehouse industry for the most part. There are two or thre firms, or half a dozen, that have one warehouse. But this is no national problem and no national issue. The facts aren't there to make it such.

The Court: I wouldn't want to set a precedent, such as it might be, a District Court decision, whereby employers who legitimately belonged under the Act could crawl out. I don't think that was the intent of Congress. I didn't make this law, either. Congress made the law, and Congress said what they were driving at was essentially retail and service establishments gauged by this test should be exempt from the law. That was the purpose of the statute,

and they tried to set up some formula to tell us who they were exempting.

They used the 50 per cent figure in sales in and out of the State, and the 75 per cent figure as to retail. It all centers around the words, "what is an establishment"?

I certainly can't see that you can take a strict geographical yardstick and solve it. It has to be more than a geographical yardstick. Query: Are we in trouble when we say to the businessman, "By the way you set up this business you can determine whether or not you come within the Wage and [78] Hour statute"?

Mr. Duemler: I think there is a very nice question of law with respect to what the word "establishment" means within the meaning of this Act, and I think we must look to the decisions and to the legislative history to decide. [79]

* * *

WILLIAM C. ELLIOTT

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: William C. Elliott.

Direct Examination

By Mr. Shaw:

Q. Will you state your residence address, Mr. Elliott? A. 16708 Huertna Road, Encino.

Q. Mr. Elliott, will you state your present employment?

A. I am a member of the board of directors, vice-president, and manager of the East Los Angeles Division of the Bekins Van and Storage [81] Company.

Q. How long have you been with the Bekins Company? A. Twenty-seven years.

Q. Would you outline briefly the nature of the duties you have had during that period?

A. Well, over that period of time I have had practically every job in the Bekins Company in the office end of the business.

Q. You are the chief executive of the East Los Angeles division which has been discussed at length in this case, is that correct? A. Yes, I am.

Q. Would you describe for us briefly the management organization of the East Los Angeles division as it operates under your supervision?

A. Well, I have an assistant manager, a superintendent of operations, an accountant, a dispatcher, sales manager, and managers of various departments, such as storage, freight.

Q. Where is the office location of those respective supervisory people that you have just mentioned? A. 1335 South Figueroa Street.

Q. Is that where your office is? A. Yes.

Q. And they all maintain their offices at that location? A. Yes, they do. [82]

Q. Now, would you describe briefly the duties of each of those individuals starting with the assistant manager?

A. The assistant manager has direct charge of the office personnel; the superintendent of opera-

(Testimony of William C. Elliott.)

tions has direct charge of the operation of the trucks and the five warehouses and their employees, or the people who work in the buildings and on the trucks.

Q. The accountant is in charge of the accounting operations as they were described by Mr. Schmidt yesterday, is that correct? A. That is right.

Q. And the dispatcher. what is his function?

A. He dispatches all trucks in the East Los Angeles division.

Q. That is trucks that may be stationed at all of the five warehouses in the division?

A. That is right.

Q. And how does he do that, in general?

A. Every order that is going to be serviced by the trucks in the East Los Angeles division is funneled into his office and he, in turn, gives them to the truck driver each morning, either by telephone or in person.

Q. You mentioned a sales manager. What, briefly, are his responsibilities?

A. His chief responsibility is to get some [83] business, and he directs the activities of six other salesmen, all of whom have desks at the Figueroa Street office.

Q. Would you describe briefly the sales technique or methods used by your sales department in the East Los Angeles division?

A. Well, each salesman is given a certain area of the East Los Angeles division and it is his responsibility to contact everybody who is going to

(Testimony of William C. Elliott.)

move or store their household goods or move them, even before they would pick up a telephone and call us. They are out beating the bushes to develop new business.

Q. May I interrupt?

Mr. Shaw: Surely.

The Court: Do you have an area that you consider the East L. A. area?

The Witness: Yes, sir.

The Court: What is that?

The Witness: Roughly, it is from the Hollywood Hills down Vermont Avenue to Hollywood Boulevard, and then it is a sawtooth boundary line down to Rossmore and Wilshire, then down to about Fairfax at Jefferson and over to Slauson Avenue, and then south to Manchester, north on, say, Avalon Boulevard, and it leaves out the Huntington Park area, but then goes to the east to the San Gabriel Wash, I believe. That is in general terms. [84]

The Court: Is that on some of the records of your company well defined?

The Witness: Oh, yes. We have a map in which each salesman is given a certain area to be responsible for.

The Court: Do you think you could take the map, which is Exhibit 2, and put the lines in on that, or at least roughly?

The Witness: Roughly?

The Court: Yes. Understand, we are not holding you to a block or two one way or the other, and

(Testimony of William C. Elliott.)

just give us a general description of that, general perimeter of that area.

The Witness: OK.

The Court: You had better use a colored pencil here. Use this red pencil.

Mr. Shaw: Perhaps a blue pencil, since Mr. Duemler has indicated his spots with red.

Mr. Duemler: I think the record shows clearly the red marks on the establishments.

Mr. Shaw: He had better use a blue pencil.

(Witness marking on map.)

The Court: On the right-hand side of the map we won't have it all on, will we?

The Witness: No. It takes in Montebello.

The Court: Which you have written on the margin of the map, Exhibit 2. [85]

The Witness: Approximately something like that. (Indicating.)

The Court: All right.

I interrupted you, Mr. Shaw, so the reporter can read that last question and you can pick up your train of thought again.

Q. (By Mr. Shaw): Mr. Elliott, are any of these sales representatives that you have just mentioned assigned to any of the specific warehouses within the East Los Angeles division?

A. They all have their headquarters at Pico and Figueroa.

Q. At the Figueroa warehouse?

A. At the Figueroa warehouse, yes, sir.

(Testimony of William C. Elliott.)

Q. Is their work designated as pertaining to any one of the five warehouses in the division?

A. Oh, no.

Q. You mentioned an area which is assigned to each of them. Are those areas selected in a manner that has any relation to any one or more of the five warehouses in the division?

A. No. We split the territory which we in East Los Angeles are responsible for.

Q. Which you have just designated on the exhibit there?

A. Yes. And apportion that territory to each of the [86] several salesmen, and they work that particular area to which they are assigned.

Q. What is the basis or theory upon which you determine the area to be given to each individual salesman?

A. We try to give each salesman an area that he can cover thoroughly and develop as much business from a particular area at one of the five ware-

Q. Do you make an effort to give them about equal territories in potential business?

A. We try to.

Q. In their handling of orders and the booking of orders is any effort made to handle all the business from a particular area as one of the five warehouses in your division?

A. I missed that question.

Mr. Shaw: Would you read it to him, Mr. Reporter?

(Question read by the reporter.)

(Testimony of William C. Elliott.)

The Witness: Not necessarily.

Q. (By Mr. Shaw): Would your answer be no or yes?

A. Well, we try to run, or I try to run the operation with everyone's help to make the most money possible, and to give the customer the very best possible service.

Q. You would naturally store goods at the most convenient and economical location, if you would happen to have space, but there is no territory assigned to any one of your [87] warehouses, is that true or not?

A. That is correct. For example, if we had an order to pick up a lot of goods very close to 1st and Western, it would serve everyone's interest best to put it in 1st and Western. However, if there were several trucks already there we would send the truck over to Pico and Crenshaw, probably, to give it prompt unloading.

The Court: Or if you had some very large matters to store, and there was ample space in one warehouse, and you were crowded in another, I suppose you would take the warehouse that would best fit the type of goods you had?

The Witness: For the particular lot, yes, sir.

Q. (By Mr. Shaw): Would that same method of operation apply between your division and another district office of the Bekins Company?

A. Well, I am only responsible for this one division——

(Testimony of William C. Elliott.)

The Court: I think Mr. Shaw means this: Supposing a load of goods was picked up out of another division over here at one of these Hollywood warehouses, would they store those goods at your warehouse up on Western Avenue?

The Witness: No; they would store it in their own division.

Q. (By Mr. Shaw): Is that practically an invariable rule?

A. Very definitely, because each manager is responsible [88] for his own particular showing.

Q. In other words, there is some rivalry between the managers of the respective divisions and districts to make the best possible showing?

A. That is correct.

Q. Could you state briefly how the relations with customers of the East Los Angeles Division, both by telephone and in personal visitations, are handled?

A. How telephone conversations are handled?

Q. Telephone and personal visitations by customers of the division.

A. We publicize or advertise our Figueroa Street number in the newspapers, Prospect 4141, and we have an ample telephone sales staff at that telephone number to answer all inquiries.

Q. Could you estimate what volume of telephone customer inquiries come to the Figueroa office as distinguished from the other warehouses in your division?

A. Yes, I would estimate about 70 per cent of

(Testimony of William C. Elliott.)

all telephone inquiries in our division come into the Figueroa Street warehouse.

Q. I would like to show you a clipping from a newspaper and ask you if you can identify that clipping as to the paper in which it was run and the approximate time it appeared in the [89] newspaper?

A. Well, this is an advertisement that was published in the Los Angeles Times newspaper, and we don't advertise in the summertime, so it would probably be in the early spring or the first part of the year.

Q. You can identify that as the first part of the year 1954? A. Yes, sir.

The Court: What is the last exhibit number, Mr. Clerk?

The Clerk: This is the first defendant's exhibit, Defendant's A.

The Court: Defendant's A. Do you offer it in evidence?

Mr. Shaw: Yes, I do, your Honor.

The Court: Defendant's Exhibit A received in evidence.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

DEFENDANT'S EXHIBIT A

Be Particular When You Store...

BEKINS SERVICE COSTS NO MORE!

Case No. 6256-C Civ
Mitchell vs. Bekins et al
Deft's EXHIBIT A
Date No IDENTIFICATION
Date 7-8-54 No A RECEIVED
Clerk, U.S. District Court, Southern Dist. of Calif.
By Deputy Clerk

Compact arrangement of your furniture in Bekins storage minimizes the space required...Bekins rates for this space are surprisingly moderate...And Bekins Standards of Storage Care insure better, continuous protection for your household possessions. You store with convenience, confidence, and economy —when you store with Bekins.

Telephone HOLLYWOOD, HOllywood 9-5181
LOS ANGELES, PRospect 4141

BEKINS VAN AND STORAGE CO

Received in evidence August 8, 1954.

76-A

(Testimony of William C. Elliott.)

Q. (By Mr. Shaw): Would you hand that to the Court, please, or to the clerk?

There is a telephone number that appears on there, Prospect 4141; what number is that?

A. That is the phone number at Pico and Figueroa Street.

Q. At the Figueroa office, which is the headquarters of your division? A. Yes, sir. [90]

Q. There is a phone number there, Hollywood 9-8181; what is that number?

A. That is the phone number at our warehouse at 1025 North Highland Avenue in the Hollywood district.

The Court: The other phone numbers shown below for the other towns around in metropolitan Los Angeles, Los Angeles County, we will say, are in other divisions, districts?

The Witness: Yes, they are, because the Los Angeles Times has a good circulation not only in metropolitan Los Angeles, but in the surrounding

(Testimony of William C. Elliott.)

area, so we advertise in the one ad the Long Beach division phone number, the Santa Barbara phone number, the San Fernando Valley phone number, and so on.

The Court: Let's go down that briefly. Arcadia, what district is that in?

The Witness: Arcadia.

The Court: That is a separate district?

The Witness: Yes, sir.

The Court: Beverly Hills, is that a separate district?

The Witness: Yes, sir.

The Court: Compton-Lynwood?

The Witness: Yes, sir.

The Court: Glendale?

The Witness: Yes, sir.

The Court: Hermosa-Redondo?

The Witness: That is a part of [91] Wilmington.

The Court: Inglewood?

The Witness: A separate division.

The Court: Long Beach?

The Witness: Separate.

The Court: North Hollywood and Burbank?

The Witness: North Hollywood and Van Nuys are one district.

The Court: This says North Hollywood-Burbank.

The Witness: They take in—some of Burbank is in their territory.

(Testimony of William C. Elliott.)

Mr. Shaw: Van Nuys appears down below there, your Honor.

The Court: Pasadena?

The Witness: Separate.

The Court: Santa Ana?

The Witness: Yes, sir.

The Court: Santa Monica?

The Witness: Separate.

The Court: Van Nuys-Sherman Oaks?

The Witness: Van Nuys and Sherman Oaks—there is a warehouse right on Ventura Boulevard, which due to local pride some people say it is in Van Nuys and some people say it is in Sherman Oaks, but it is part of the San Fernando Valley District, which is North Hollywood and Van Nuys.

The Court: Hermosa is part of Wilmington?

The Witness: That is right. [92]

The Court: So none of these towns in small print at the bottom of the page there are within the East L. A. division?

The Witness: No, sir.

The Court: They are other districts?

The Witness: That is right.

The Court: Go ahead.

Q. (By Mr. Shaw): Mr. Elliott, would you describe the relative volume of moving and storage business handled by the Bekins Company on Saturdays as compared to the other days of the week?

A. Saturday is our biggest day for truck moving.

Q. Is that by a substantial margin as compared to the earlier days in the week?

(Testimony of William C. Elliott.)

A. Yes, it is, we are always busy on Saturday, where during the week we might have a few trucks idle.

Q. Is it your experience that providing moving and storage service on Saturday is a convenience to the public? A. It certainly is.

Q. What would be the effect upon the charges which your division would make to the public if it became necessary to pay your operating employees on a time-and-a-half basis for Saturday work?

Mr. Duemler: If the Court please, I object to the question inasmuch as there is no issue in this case with respect to time-and-a-half payment for Saturdays. The only issue [93] in this case is the time-and-a-half requirement for hours in excess of 40 per week.

The Court: Let's consider the question reframed, then, to say, what would be the effect on your business if you worked your men five days, Monday through Friday, at eight hours a day, and then worked them eight hours on Saturday and paid time and a half for Saturday?

Mr. Shaw: I will accept that rephrasing as an improvement.

The Court: Is that all right?

Mr. Duemler: I have no objection to that.

The Court: All right.

The Witness: We would naturally have to pass the additional pay on to our customers, and I think they would probably not pay it, and we wouldn't

(Testimony of William C. Elliott.)

have nearly as many customers on that particular day.

Q. (By Mr. Shaw): Are there alternative methods whereby customers can move household goods to the use of the service of Bekins and its competitors?

A. Yes. We have a lot of customers, in fact we encourage customers to bring a small lot of goods into the warehouse in their own truck or trailer, and to pick up the goods from the warehouse in their own trailers.

The Court: Let me go back a minute.

This question that I reframed, I am permitting the answer [94] to that for a very limited purpose. I know, and we all know that the convenience of the company, whether it cost them more money to comply with the Fair Labor Standards Act is not by itself a determining factor. I am considering it, however, only in connection with the way the management of this company has set up their business and as to what bearing, if any, it has upon the method they have set up to operate their business, and the type of business that they are operating, and so forth.

Mr. Duemler: Do I understand, your Honor, that the question of paying time and a half was limited to the Alameda branch warehouse?

The Court: That's right.

Mr. Duemler: There is no claim on the part of the Government that they should pay time and a

(Testimony of William C. Elliott.)

half to any other employees. We recognize the exemption is applicabe to the others.

The Court: I understand that. The point is this: Certainly it is no defense to a claim under the Fair Labor Standards Act that the employer might have to pay more money, if his employees came within the terms of the Act. But the matter may have some bearing on the other matter that I mentioned. Go ahead.

Q. (By Mr. Shaw): Mr. Elliott, making reference to the five warehouses which are operated within your East Los Angeles [95] division, could you state when Bekins acquired or first leased the five warehouses, and give us a little of the history of their original acquisition for use by Bekins?

A. Well, the Bekins Van & Storage Company in California was founded in 1895, and originally they had a rented building on about 2nd and Broadway, in which they carried on their business. Shortly after that time Mr. Bekins purchased some land at 4th and Alameda Street and erected a home for his family on that particular site, and in 1898 built a brick building for the storage of household goods at that location.

The Court: That is now the location of the Alameda Warehouse?

The Witness: Yes, sir. That was the first company-owned Bekins warehouse in Los Angeles. And at that time the residential area of Los Angeles was in and around 4th and Alameda Street and eastward over the river in the Boyle Heights area.

(Testimony of William C. Elliott.)

Q. (By Mr. Shaw): Where did you live in your youth, Mr. Elliott?

A. I lived at 20th and Maple Avenue.

Q. So you are familiar from long standing with the growth and development of the Los Angeles area? A. Yes, I am.

Q. All right. Now, the Figueroa warehouse, can you give us the same information about that? [96]

A. The first building at the Figueroa Street address was built about 1907, and there, too, the Bekins Company was putting a warehouse adjacent to residential districts. By that time the nice residential district of Los Angeles had gone out South Figueroa Street and west from there.

The Court: That property is owned, then, by Bekins?

The Witness: Oh, yes.

The Court: Go ahead.

Q. (By Mr. Shaw): Could you give the same information about the Crenshaw warehouse at Pico and Crenshaw?

A. The Crenshaw warehouse is wholly owned, and the land was purchased about 1926 and the warehouse was constructed around 1928 or '29, if my memory serves me correctly, and there again it was to follow the residential development of the city, because at that time Leimert Park and all that area to the south of Pico and Crenshaw was very active.

Q. Would you describe for us the acquisition

(Testimony of William C. Elliott.)

for the use of the Wilshire warehouse on Western Avenue?

A. The Wilshire warehouse at 1st and Western, controlling interest of the Wilshire Fireproof Storage Company was purchased by the Bekins Company in about 1931.

Q. At that time the Wilshire Fireproof Storage Company owned that building, is that correct?

A. They did, and they had been—and that building was first built about 1924, which served that area west of [97] Western Avenue and the very fine residential districts there.

The Court: As to the Wilshire warehouse, the Bekins Company owns a controlling interest in another corporation that owns it, is that it?

The Witness: We wholly own that corporation at the present time. We took control of it—we bought control in '31.

Q. (By Mr. Shaw): And did the Bekins Company commence to lease that building from 1931, and do so ever since until the present time?

A. That is right. And it is operated as a Bekins building.

Q. Could you give us the same information about the Grand Avenue warehouse?

A. The Grand Avenue warehouse was purchased in the early part of 1942 when there was a terrific demand for storage space for household goods due to war conditions, and the company purchased that building which had been operating as a Burt Smith

(Testimony of William C. Elliott.)

storage house, which was in conjunction with the Burt Smith Furniture Company.

Q. You have described a little of the nature of the environment of each of these locations as of the time that they were acquired; will you trace for us, briefly, the change in the history of those respective environments from [98] that time until now, taking them one by one?

A. Alameda warehouse, we don't have the homes immediately adjacent to that particular building any more. We have industry. Although we do have a considerable number of homes over in Boyle Heights that we get quite a bit of business from. So we have a goodly portion of our warehouse at 4th and Alameda Street devoted to the storage of used household goods, and because we are on a spur track we load and unload freight cars of household goods that are shipped into and out of Los Angeles at that particular building, and we use some of it for the storage of commercial goods. That is for phonographs and radios and washing machines, and things like that.

The Court: Do you have any spur tracks at any of these other locations, these other four?

The Witness: We do at 36th and Grand.

The Court: That is the only one, the only other one?

The Witness: Yes.

The Court: And you can bring household goods in by train with equal ease to either Alameda or Grand?

(Testimony of William C. Elliott.)

The Witness: Which we do, yes.

The Court: Either one?

The Witness: Yes, sir.

Q. (By Mr. Shaw): With respect to Figueroa, will you describe what has happened to the surrounding area there since it was acquired?

A. The surrounding area at Figueroa Street has——

Q. Pardon me. When I say "surrounding area" I don't mean just within a block or two, but I mean what you might regard as the service area that it was originally intended to serve.

A. South Figueroa Street does not have homes on it any more. It is now populated with used car lots, and big old homes that we used to get business from are now rooming houses and boarding houses. So we don't have the demand for the storage of household goods from the area immediately around Figueroa Street, Pico and Figueroa Street, that we did at one time. So we try to rent the space and to keep it rented. For example, at Figueroa Street we are advertising and pushing an office record center, so that the various companies in the downtown area and adjacent area to Figueroa Street can store their dead office files and records. And we rent space in the Figueroa Street building to customers who need blocks of five thousand foot space, and we still have a goodly amount of that warehouse devoted to the storage of household goods, and we do store some commercial goods at the Figueroa Street warehouse.

(Testimony of William C. Elliott.)

Q. What has happened at the Crenshaw warehouse since it was acquired, and the surrounding area?

A. Well, we have constructed warehouses in the suburbs, [100] like for example, in Inglewood, and we don't have the demand for household goods storage at the Pico and Crenshaw building that we did in 1929. So we lease some space, about four floors, I think, of that building to a furniture store who operates under the Bekins name.

At 1st and Western we also have some space in that building leased to a furniture store, and we have space leased to, oh, for example, Hughes Aircraft Company who keep their office records in that building.

Q. That is on a lease basis?

A. That is on a yearly lease basis, yes.

Q. Now, keeping in mind those changes and developments, can you state whether the type of business now being done by the East Los Angeles division makes necessary a central organization for the division and a single administrative operation?

A. Yes. We cannot economically operate those five warehouses except under central or one management. For example, we have a staff or crew of men at each one of the various warehouses, and we have a crew of regular employees on each piece of equipment which the branch owns; however, we get moving jobs for, say, a group of attorneys or lawyers who would move on one particular day, Saturday, and we would have to have more than two

(Testimony of William C. Elliott.)

men on each truck, so we would take the men who are regularly stationed in the warehouses and put them on the trucks to do these moving jobs. And we find on large jobs sometimes we have to have twenty, thirty men working, maybe, for a day, and another group of that many men working at night, to move a business establishment or a retail—or, for example, Hoffman Hardware Company, or an outfit like that that moves. We have to have this reservoir of highly skilled, trained furniture movers to get the business.

Q. In other words, a portion of the work done by your division consists of very large moving jobs, is that correct? A. That is right.

Q. And with particular reference to that type of job do you have more flexibility and ability to provide service from a single organization of your division than you would if it were broken down into five separate operations?

A. As you brought out, or as I brought out, or the judge brought out, we have more or less rivalry between district managers, and if the East Los Angeles operation was broken down into several parts there would be nothing but chaos and confusion in territorial lines and man-power. As it is now we have a tight organization which is very fluid and elastic. And if we have a big moving job we will take probably every one except one man from each one of the several warehouses and put them out on a moving job. And we couldn't operate un-

(Testimony of William C. Elliott.)

less we had this reservoir of men under my own personal jurisdiction.

Q. Mr. Elliott, who do you consider to be responsible for the performance and success or failure of the individual warehouses in your division, such as Alameda? Is there any one at Alameda whom you consider to be responsible for the success of its operation?

A. No. I feel that I have the responsibility to see that the Alameda warehouse and the Grand Avenue warehouse, and the Figueroa Street warehouse—in fact, the unit, operate economically and effciently. And with me the superintendent of operations and the assistant manager, and one of us will be at every warehouse every day to check up and see what is going on and dicate the policies. The assistant manager and the superintendent of operations are definitely in charge of the five warehouses.

Q. Is there anyone at Alameda whom you consider to be responsible for its success or failure?

A. No.

Q. In other words, you accept that responsibility yourself with these assistants that you mention who are in charge of the entire division?

A. That is right.

Mr. Shaw: No more questions.

Mr. Duemler: I have very few questions. [103]

Cross-Examination

By Mr. Duemler:

Q. Are you familiar with the structure of multi-unit organizations, generally?

(Testimony of William C. Elliott.)

A. I have spent my life pretty near with the Bekins Van & Storage Company, and I don't know much about anything else.

Q. It is your opinion, however, that in the operation of a multi-unit organization, such as Bekins, I believe your testimony is that centralized management is essential; is that correct?

Mr. Shaw: Your Honor, I object to that question, partly because the witness has stated he doesn't have information about other multi-unit operations, and the latter part of the question appears to summarize the witness said, which I don't think he ever said.

The Court: Overruled. Read the question to the witness. I think it is a proper question.

(Question read by the reporter.)

The Witness: Well, I firmly believe that the operation as we conduct the five-warehouse-operation of the Bekins Van & Storage Company as a unit, I believe that is highly desirable and the only way it can operate.

Mr. Duemler: I think those are all the questions I have. [104]

Redirect Examination

By Mr. Shaw:

Q. When you speak of the five warehouses, in your response to the last question, you meant the five of the East Los Angeles division, did you not?

A. That I am in charge of, yes.

Mr. Shaw: That is all.

The Court: Thank you, sir.

Mr. Shaw: Your Honor, I would like to call very briefly one more witness, Mr. Bryant, who is here. It will just take five minutes or less, I think.

DANIEL P. BRYANT

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Daniel P. Bryant.

Direct Examination

By Mr. Shaw:

Q. Will you state your residence address?

A. 1628 Laurel Street, South Pasadena.

Q. Would you state your present position?

A. Vice-president and general manager of the Bekins Van & Storage Company, on the board of directors.

Q. Where did you receive your educational training? [105] A. Stanford.

Q. What course did you take there?

A. Liberal arts and law.

Q. Will you describe briefly your business career after that time?

A. When I got out of school I was with the—that was in 1934, from law school—I was with the Bekins organization for a period of months, and

(Testimony of Daniel P. Bryant.)

then went into the practice of law for a period of about nine years.

Q. After that? A. Then back with Bekins.

Q. During your period of law practice did you do legal work for Bekins? A. Yes.

Q. And after you returned to Bekins, which was about what year? A. 1943.

Q. What was your position and responsibility after that time?

A. Well, I went back full time as vice-president and went into operations, and then in 1945 became general manager.

Q. And you have been general manager in charge of all operations for the company since that time, all operating matters for the company since that time? A. Correct. [106]

Q. In your period of connection with Bekins, do you know whether or not consideration has been given by its management to dividing the East Los Angeles division into smaller units?

A. Yes.

Q. Would you state when that was and what the circumstances of such consideration were?

A. Over a period of years the philosophy has gradually developed in the Bekins Company that a decentralized program was the best possible program that could be followed in the interests of economic operations, best service to the public, and the kind of program that would provide the most stimulus to the personnel, development of executive material, so we followed a studied program of decen-

(Testimony of Daniel P. Bryant.)

tralization, breaking the operations down into the smallest possible parts.

Q. You are speaking now of the Bekins Company as a whole?

A. That is the Bekins organization generally. The result of that was that as new buildings were erected in new localities, they were set up on a decentralized basis under separate management, each manager with his own staff, equipment, personnel and so on. In addition to that action that was taken in regard to the establishment of new buildings, a study was made to determine what could be done in breaking down and decentralizing operations that were already in [107] progress. And as a result of that breakdowns were made, and in the course of that at one time Hollywood was operated under—and East Los Angeles—was operated under the same manager, but it was determined that there could be a carrying out of the decentralized program and breakdown, because of certain geographical reasons and community reasons. When it came to East L. A., consideration was given to that both around 1945 and then again around 1950, when we again reviewed that with the idea, is it possible to break East L. A. down at all and create any separate managements, even though we might have the East L. A. division under one head company we have, still, separate branches within that division? And the conclusion was again reached that we had taken a group of warehouses that had a relation to one

(Testimony of Daniel P. Bryant.)

another, a natural cluster or grouping of warehouses, in a single community, and had broken it down just as far as it could be, and it was impractical and impossible from any business standpoint to break that down further; that from the standpoint of economy and management, that it had to be operated as a single establishment or unit.

Q. Did the type of work and service performed by that division enter into the decision that you have just described?

A. Yes, it did. The nature of the community did. We just couldn't see any possible way of creating any separate or number of establishments out of that. It just seemed to be [108] an irreducible minimum, and we have concluded that we couldn't go any further in that regard. As a matter of fact, we have felt that we had more warehouses in that area than would be desirable from a practical standpoint, if we could combine or even put them under one roof it would probably be better from the standpoint of economy, but it is an irreducible minimum in our opinion as far as operations are concerned.

Q. In your opinion is that decision now applicable as much as it was in 1950 when it was last reached?

A. Yes, it is. And as time goes on, and particularly as the downtown area of Los Angeles develops more and more with commercial enterprises, and we know that is going on, we are familiar with properties that are being purchased and that are to be developed, and it will be increasingly so, I see no

(Testimony of Daniel P. Bryant.)

possibility of further decentralizing or decentralizing East L. A. It has got to operate as a single establishment.

Q. The East Los Angeles division, do you mean?

A. That is what I mean.

Mr. Shaw: I have no more questions, your Honor.

Mr. Duemler: No cross-examination.

The Court: Thank you, Mr. Bryant.

Mr. Shaw: The defendant rests.

The Court: Is there any rebuttal, Mr. Duemler?

Mr. Duemler: No rebuttal, your Honor. [109]

* * *

The Court: Before we close the case, I think the record should show that the pretrial stipulation is a part of the record. It is on file and will be considered by the Court as part of the record in the case. [110]

* * *

ORAL OPINION

The Court: I am prepared to decide this case.

I did some work on this case before. We had a pre-trial. It hasn't been presented to me only yesterday and today.

We have here a company engaged in what might be called the business of storage and transportation. I think the record shows that most of its work concerns—at least a major part of it—the transportation and storage of household goods. There are, also, other activities, such as the storing of commercial

goods, the rental of space to companies for storing of records, the cleaning of rugs, the sale of furniture, all closely connected with the business of transportation and storage.

The company starts out in 1895 in a small American city. It builds a warehouse in the early days, 1898, at 4th and Alameda. The court was born in California and has seen the development that has occurred here, and 4th and Alameda was at one time, although I can't go down to 1898, an [119] entirely different section to what it is now. Now it is in what we call the heart of the industrial district. Then it was a residential area. As time went on the city extended to the south. The company bought another piece of property on Figueroa Street.

The court is also familiar with the old homes in that area. It was at one time a very fine residential district. And there a warehouse was built.

And with the western expansion of the city the Crenshaw warehouse was constructed. And for similar, like reasons Wilshire and Grand Avenue.

Now, the company of course operates throughout this State, throughout all of the metropolitan area in Southern California. The company has followed a practice of decentralizing as much as they thought was economically feasible, and they have selected an area which is now shown on Exhibit 2, the map, which they call the East L. A. division. In that division are the five warehouses in question, including the Alameda warehouse, and one of the five is on Figueroa Street adjacent to the office of the division which has jurisdiction over this area. The map

shows that that area is astride the center of the city of Los Angeles. It is a little hard to estimate. The area might extend 10 miles or more crosswide. The warehouses are located in the very heart of it. And according to my computations no one of the other four warehouses [120] is more than 3½ miles from the warehouse and headquarters on Figueroa Street, according to the check I have made.

Mr. Shaw: It is covered in the stipulation, your Honor, and your computation is precise.

The Court: I forgot the stipulation, but those are apparently the facts.

In conducting this business the company receives and sends out goods by truck, receives and sends out goods by rail. Two of the warehouses have spur tracks, Alameda and Grand Avenue. A general dispatching system is used so that goods may be sent to any one of the five warehouses from any part of the district. The company takes into account the thing which is most economically feasible, and that would probably mean what space is available, what trucks are operating, whether loading is going on or not going on, the size and amount of the material to be stored, its nearness to a warehouse, all factors, and then goods are stored.

The Company has elected to treat this as one enterprise having a central management and auditing, bookkeeping system. The company, therefore, contends that they have one establishment. I should also point out that the company has negotiated with a very strong and effective trade union, has a bargain-

ing contract with them covering all five warehouses in the East L. A. division. I should point out, also, that there is an interchange of workers between these areas; that it is [121] entirely possible with this central spstem to dispatch men or trucks from one place to the other; that where big storage jobs are concerned it is probably necessary to call on men from the other warehouses to assist on such a job.

This case hinges upon an interpretation of Section 13(a) (2) of the Fair Labor Standards Act, 29 U.S.C.A., Section 13(a) (2), and in particular upon the meaning of the word "establishment."

What constitutes an establishment will depend upon the particular facts in each case. Certainly, it cannot be determined by the application of a geographical yardstick. For example, whether a warehouse used by a retail establishment is in an adjacent building, across an alley, across a street, around the corner or a mile or two away, is certainly not the test for determining whether the warehouse and the retail store constitute one establishment.

One must certainly take into consideration the facts concerning the make-up of our large cities. The cost of real property or real property leases, the availability of space, the convenience of traffic, the location of residence areas and similar factors. In other words, the fact that the business enterprise locates its warehouse somewhat distant from its main office in a metropolitan center must be viewed in the light of present realities.

We come then to what seems to the court to be the determining factor, that is, how far should the decision of the [122] business enterprise, in the way it operates its business, control as to whether or not certain of its employees come within the terms of the Act. The businessman has a legitimate interest in being let alone to operate his business as he pleases.

The Government has a legitimate interest under the Act in seeing to it that employees who legitimately come within the terms of the Act, receive the benefit of this economically wise and forward-looking legislation. Is it possible, therefore, for the business enterprise, merely by the way it sets up its organizational accounting and business functions, in substance, to make the decision as to whether or not it comes within the Act, or more specifically, make the decision as to whether the enterprise is one establishment or more than one establishment.

It seems to the court that a rule of reasonableness should be applied. If the set-up as made by the enterprise of its management, business, and accounting functions, viewed in a reasonable light, constitutes one establishment, then the law should so hold. If, on the other hand, the enterprise as set up, tested under such a rule of reason, does not legitimately constitute one establishment, but several, the law should so hold.

Extreme cases can be supposed which would well illustrate this principle. Suppose a chain store organization operates several retail stores scattered throughout the city, and also [123] a central warehouse and office building. Suppose, further, each

retail store dealt with its customers, handled its own cash, and was for all ordinary intents and purposes a separate establishment. It would be wrong to permit that business enterprise, merely by the way in which it set up its management, organization, the accounting and business practices, to contend, and secure a holding, that the entire enterprise was only one establishment. Tested by a rule of reasonableness, the action of the enterprise would fail to meet the test.

On the other hand, suppose a retail establishment located in a metropolitan center, in the course of its expension required additional warehouse space, and space was available immediately adjacent to the retail store at a very high figure, while five miles away in the same metropolitan center space was available at a much lower figure, with better parking facilities for employees and with less traffic problems for the users of the warehouse, under the test of reasonableness it would certainly be reasonable for the company to acquire the warehouse at the distant place and to treat and consider the warehouse and retail store as one establishment.

Judged by such a rule of reasonableness, and the facts of this case, including the nature of this metropolitan area, the environs surrounding the warehouses, the present operation of the East L. A. division as a unit, we hold that the set-up [124] of the East Los Angeles division, consisting of the five warehouses and the central office, all located within what would be called the geographical central section of metropolitan Los Angeles, and with each of

the four other warehouses located within a radius of less than 3½ miles from the central office, and the warehouse there located, and the integrating of the five warehouses into one business unit, as shown by the facts of this case, is certainly reasonable and clearly constitutes one establishment.

Application for an injunction will be denied.

The defendant will prepare findings of fact, conclusions of law and judgment within the time provided by the rules of this court. Ten days, I believe, is it, Mr. Clerk?

The Clerk: The rule doesn't fix the time.

The Court: All right. Ten days.

Now, Mr. Duemler, you very diligently presented this. I may be wrong, but I can't apply a geographical test in this case. It seems to me under the very wording of the Act, this matter of the 75 per cent, you have to take into account the nature of the business. As I have indicated, I don't think a businessman has it within his power to completely determine whether he comes within the Act or not, but I think he has the right to run his business as he wants to, and if the type of organization that he selects is a reasonable one, which viewed from all corners of the picture seems reasonable, [125] then the fact that he has integrated the parts of his business into one establishment seems to me should make it an establishment.

On the other hand, I don't think that he could take a chain store situation and by his business practices make it one establishment.

I could point out a lot of other distinctions between the storage business and a retail store business, a chain business. Your Safeway Stores carry on identical business. They are located in areas where they can secure their customers. Each of them becomes a complete unit in itself supplied from central warehouses.

The storage business is a different proposition. The storage business takes space, it takes certain types of buildings. It requires a fireproof building, generally, a concrete and steel structure. It take a lot of space. The mere fact that a storage company has so expanded its business within the limited core of a great metropolitan center—here we have the East L. A. division taking up a very small part of this metropolitan center, the fact that it has expanded and needs additional warehouse space and winds up with five warehouses within that very limited area of this metropolitan center doesn't seem to me to have it follow that each one of those warehouses becomes a separate establishment. [126]

If these five warehouses were located side by side down on Figueroa Street, I don't think plaintiff would seriously contend that they were separate establishments. Or suppose four of them were located there and one of them was located out where it had a spur track, I don't think there would be any contention that they are separate establishments.

I don't think there is any real comparison between the storage of goods, the transportation and storage of goods, and retail stores.

I don't think my decision is going to cause you any embarrassment in connection with retail stores.

* * *

[Endorsed]: Filed December 29, 1954. [127]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 45, inclusive, contain the original complaint; answer; stipulation and order, findings of fact and conclusions of law; judgment; notice of appeal; statement of points on appeal and designations of record on appeal which, together with reporter's transcript of proceedings on September 7 and 8, 1954, and original plaintiff's exhibits 1 and 2 and defendant's A, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 11th day of January, A.D. 1955.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14618. United States Court of Appeals for the Ninth Circuit. James P. Mitchell, Secretary of Labor, United States Department of Labor, Appellant, vs. Bekins Van & Storage Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 12, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,618

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor.

Appellant,

vs.

BEKINS VAN & STORAGE COMPANY, a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Pursuant to Rule 17(6) of the Rules of this Court, appellant makes the following statement of the points on which he intends to rely:

1. The lower court erred in making Findings of Facts Nos. (2) (first sentence thereof), (3), and (16) (last sentence thereof), and in making Conclusions of Law Nos. (1), (2), and (3).

2. The lower court erred in concluding that the five separate storage warehouses comprising defendant's East Los Angeles Division, including its Alameda warehouse, constitute a single establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act of 1938, and that all of defendant's Alameda warehouse employees are within the exemption provided by that section of the Act for employees of a retail or service establishment.

3. The lower court erred in dismissing the complaint and in failing to grant the injunction prayed for in the complaint.

/s/ STUART ROTHMAN,
Solicitor,

/s/ BESSIE MARGOLIN,
Assistant Solicitor,

/s/ KENNETH C. ROBERTSON,
Regional Attorney, United States Department of Labor, Attorneys for Appellant.

[Endorsed]: Filed January 19, 1955.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO ORIGINAL EXHIBITS

The parties hereto respectfully request that the following designated exhibits, because of their nature, be considered by the Court in their original form and that the Court dispense with their reproduction in the printed transcript of the evidence:

1. Plaintiff-Appellant's Exhibits 1 and 2;
2. Defendant-Appellee's Exhibit A.

WILLIAM FRENCH SMITH,
GIBSON, DUNN &
CRUTCHER,

By /s/ WILLIAM FRENCH SMITH,
Attorneys for Defendant-
Appellee.

/s/ STUART ROTHMAN,
Solicitor,

/s/ BESSIE MARGOLIN,
Assistant Solicitor,

/s/ KENNETH C. ROBERTSON,
Regional Attorney, United States Department of Labor, Attorneys for Plaintiff-Appellant.

Dated: February 1, 1955.

[Endorsed]: Filed February 1, 1955.

In United States Court of Appeals for the Ninth Circuit

Argument and submission

October 7, 1955

[Omitted in printing.]

In United States Court of Appeals for the Ninth Circuit

Order directing filing of opinion and filing and recording of judgment

March 1, 1956

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

In United States Court of Appeals for the Ninth Circuit

No. 14618

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

BEKINS VAN & STORAGE COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

Opinion

March 1, 1956

Before STEPHENS, FEE and CHAMBERS, Circuit Judges

CHAMBERS, Circuit Judge: Bekins pays its employees at its Alameda warehouse in downtown Los Angeles on a basis of 48 hours per week without overtime for work in excess of 40 hours per week. The Secretary of Labor says this is wrong and seeks overtime pay for the employees at this one warehouse because of its high percentage of interstate business at this one place considered alone. Bekins replies that the Alameda warehouse is one of five scattered warehouses in downtown Los Angeles which it operates as a unit known as the East Los Angeles Di-

vision. If the one warehouse classifies as an "establishment," the Secretary of Labor is right.* If the "establishment" is Bekins unit of five warehouses, he is wrong, because more than half of the total business of the five warehouses is local, intrastate, a service, and possibly retail.

The district court ruled in favor of Bekins and the secretary has appealed.

For a full understanding of the case, one should read the findings of fact and conclusions of law of the district court which are hereinafter set forth as an appendix to this opinion.

For reversal, the secretary relies principally upon Phillips vs. Walling, 324 U. S. 490. That was the case of overtime pay for the warehouse employees in one warehouse which received groceries in interstate commerce and distributed them to some of the company's chain stores in Massachusetts and Connecticut. The wage provisions of the Federal Fair Labor Standards Act were held to be applicable and the employees not within any exception.

Naturally, if the Phillips case is apposite, this court must follow it. But, to this court, (and it may be oversimplification to say so) it seems that the rationale of the Phillips case lies in the fact that the warehouse function historically had been that of independent wholesalers or wholesalers independent of retail grocers. The impact of the act was not to be avoided by setting up of an "integration" of wholesale and retail functions. Phillips warehousemen should have the same protection the warehousemen have in warehouses not integrated with the retail selling operation.

This court does not believe Phillips to be necessarily controlling and affirms the trial court. If Phillips holds that if a business is in separate buildings, each building is necessarily an establishment then, of course, this court is wrong. It hardly seems though that Phillips goes that far.

Here the defendant's pattern of business with central control at one of the area warehouses existed before the adoption of the act. No one suggests that Bekins has adjusted its business to try to get around the act. The unit of operation of Bekins seems to be the "division." Doubtless, the secretary would not take the position he does here if the buildings were side by side, although separate. It does not seem unreasonable to consider the five warehouses, generally in downtown Los Angeles within a limited radius, as one establishment.

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*The section involved, 29 U. S. C. A. 213, so far as pertinent, reads as follows:
"§ 213. Exemptions
"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *."

Geography may well play quite a role. Probably, if the buildings were to be found scattered in San Diego, Los Angeles, Long Beach, Pasadena, Santa Barbara, Bakersfield, San Bernardino, and Riverside (with central control at one office) the trial court's conclusions would be clearly erroneous.

To this court, an important factor here is that if it were not for financial or capital problems and the necessity of using what one has, it would be quite feasible to conduct, and Bekins probably would conduct, the business of the five warehouses in one central warehouse under one roof.

This court believes that, although there is no real dispute on facts, the trial court still was entitled to appraise the facts and make a determination as to which facts really pointed to "one establishment" and which pointed to "separate establishments." The decision here is simply that it is possible for one business located in several buildings, neither contiguous nor widely scattered, to be one establishment and that the proprietor's unit of operation and control may be considered, in a case like this one, in determining what is an establishment.

Here the trial court found one establishment. The proprietor's historical unit of operation and control were considered. His natural business policy was given weight by the trial court. However, these factors were not used mechanically or given conducive force. These were some of the shadings in a problem of fact.

This court does not join the district court in chiding the Secretary of Labor for bringing the action when the individuals concerned are members of a strong union, the Teamsters, presumably able to protect the men. Bekins and the Teamsters cannot get together and set aside the positive policy of the act.

Affirmed.

[File endorsement omitted.]

Appendix

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DISTRICT COURT

"FINDINGS OF FACT

"(1) Plaintiff does not contend that any of defendant's warehouses either in the East Los Angeles Division or elsewhere fail to meet the tests of exemption as a retail or service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act, as amended, except only the Alameda warehouse. [22]

"(2) The East Los Angeles Division of defendant, including Alameda, is a single establishment within the meaning of section 13 (a) (2) of the Fair Labor Standards Act (29 U. S. C., sec. 213 (a) (2)), the business activities of which are to be considered

together as a unit, and as such an establishment, more than 50 percentum of its annual dollar volume of sales of goods or services is made within the state in which it is located and 75 percentum of its annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry. Such tests are not met in the case of the Alameda warehouse considered separately.

"(3) All of the employees of defendant's East Los Angeles Division, including those at Alameda, are employed by a retail or service establishment which qualifies with the requirements of section 13 (a) (2) of the Fair Labor Standards Act (29 U. S. C., sec. 213 (a) (2).

"(4) Defendant is, and has been since 1950, and long prior thereto, a California corporation, having its principal office and place of business located at 1335 South Figueroa Street, Los Angeles, California. The business of defendant includes the moving and storage of household goods, the moving of used office equipment and furniture, the moving of complete offices, stores and commercial and industrial operations, rug cleaning, fur storage, rental of office and building space and storage of commercial goods. Defendant owns approximately 20 per cent of the stock of Bekins Van Lines Co., which is a motor common carrier of household goods throughout the United States.

"(5) Defendant operates 36 warehouses which are grouped in 19 divisions or districts in various cities within the State of California, and at each warehouse employees are regularly engaged in the storage, cartage, packing and shipping of household goods, and each is used as a terminal point for the moving by motor van of household goods both locally and for long distances. All of said warehouses except one regularly engage in the receiving, storing and delivery of commercial goods. Then of them have railroad sidings. Substantial quantities of the goods handled, packed and stored by defendant at its various warehouses have been, and are being, received from points in other states and outside the United States and have been, and are being, handled, packed, shipped, delivered, transported, and offered for transportation to points in other states and outside the United States.

"(6) The business of defendant was commenced in 1895 in Los Angeles, California. Thereafter, the company grew and expanded principally with respect to moving and storage of household goods until in 1945 it was operating moving and storage warehouse businesses with warehouses in the principal cities in the State of California.

"(7) In 1946 and thereafter until the present time, defendant continued rapid expansion and growth of its business and facilities. It built approximately twenty new warehouses or warehouse ad-

ditions during that period in many cities in California. It attemped to provide warehouse facilities by new construction to serve rapidly growing and expanding residence neighborhoods.

"(8) In connection with it expansion from its beginning until the present time, it has been the policy of defendant to decentralize its management to the maximum extent possible. It is defendant's belief that moving and storage service can best be provided at its numerous warehouses through a local organization at the various locations which has full responsibility for all phases of the service provided. Defendant has therefore divided its warehouses into 19 divisions or districts, each of which has district manager in charge who is responsible for all of its operations. In the Los Angeles [24] area, defendant has such district offices in its East Los Angeles Division, its Hollywood District, Beverly Hills District, Compton-Lynwood District, Glendale District, Wilmington District, which includes Hermosa and Redondo; Inglewood District, Long Beach District, San Fernando Valley District, Pasadena District, Santa Ana District and Santa Monica District. The management of defendant believes in, and has adopted, adequate and thorough record keeping and control systems to measure the performance and success of its various district offices.

"(9) Originally in defendant's operations in the Los Angeles metropolitan area, it was organized with a West Los Angeles Division and an East Los Angeles Division. The West Los Angeles Division included Hollywood, West Hollywood, Beverly Hills and Santa Monica, and the East Los Angeles Division included the warehouses at Alameda, Figueroa, Crenshaw, Wilshire and Grand Avenue which still are included in the East Los Angeles Division. Prior to 1946, following defendant's policy of decentralization, the West Los Angeles Division was divided into the Hollywood, Beverly Hills, and Santa Monica districts with separate district managers at each one. In 1946 and again in 1950, the executive management of defendant gave thorough consideration to the dividing into smaller units of the East Los Angeles Division and after considering the facts decided that it was not practical nor feasible to divide the East Los Angeles Division consisting of five warehouses into smaller units.

"(10) Defendant's East Los Angeles Division consists of five warehouses in the central part of the city of Los Angeles. The photographs in plaintiff's Exhibit 1 are reasonable representations of the exteriors of the five warehouses in the East Los Angeles Division. The main office and one warehouse of this division is at 1335 South Figueroa Street, herein called 'Figueroa.' The other warehouses are located at [25] 3625 South Grand Avenue (herein called 'Grand Avenue'), 4174 West Pico Street (herein

called 'Crenshaw'), 116–122 South Western Avenue (herein called 'Wilshire'), and Fourth Alameda Street (herein called 'Alameda'). The Alameda Warehouse is approximately 1¾ miles from Figueroa, and the others are from 1.8 to 3.5 from Figueroa. Defendant's general office for the entire business is located at Figueroa. Plaintiff's Exhibit 2 is a map of the city of Los Angeles showing the locations marked with red pencil of the five warehouses in the East Los Angeles Division.

"(11) Each of the warehouses included in the East Los Angeles Division contains warehouse space, loading docks, packing equipment and yard area for the servicing and operation of household goods motor vans, as well as for accommodating motor trucks. The Alameda and Grand Avenue warehouses are equipped with a railroad siding. Upon plaintiff's Exhibit 2 is marked in blue pencil the approximate area which has been officially designated by defendant as the territory to be served by the East Los Angeles Division to the exclusion of defendant's other districts in the Los Angeles metropolitan area. The East Los Angeles division is responsible for providing moving and storage and other services in this territory but this territory is not further subdivided or broken down as to services to be rendered by any particular warehouse within the East Los Angeles Division.

"(12) Defendant has numerous employees working for its East Los Angeles Division and rendering services of the type herein described. Eleven of these employees work at the Alameda warehouse of defendant. Of said 11 employees, 8 work hours in many work weeks in excess of 40 hours and less than 48 hours but do not receive overtime compensation for such hours worked in excess of 40 hours. Of the remaining 3 employees at Alameda, [26] one is specifically exempted from Section 6 and 7 of the Fair Labor Standards Act by section 13 (a) (1) thereof, as a bona fide executive employee, and two are office workers, who are paid by defendant by the hour and regularly work 48 hours per week with time-and-one-half pay for hours in excess of 40 per week.

"(13) The Alameda warehouse is a five-story reinforced concrete building of approximately 60,000 square feet consisting of office space about 15 x 30 feet, truck and van loading docks, railway loading docks, and five storage areas. There are two office employees at Alameda whose duties generally consist of the following: preparing documents used in connection with receipt and delivery of storage lots, maintaining stock cards on commercial storage, answering the telephone, figuring storage rates, preparing warehouse receipts and carrying on other comparable clerical work. There is one warehouse foreman at Alameda whose duties generally consist of the following: physically handling and moving stored goods, checking stored goods in and out of the ware-

house, supervising other warehouse employees, opening and closing the building, carrying on fire prevention measures, supervising and working on loading and unloading of freight cars, reporting incompetent work to supervisors, selecting locations in the warehouse for storing goods, and performing minor clerical work in connection with receipt and delivery of stored goods.

"(14) Defendant, since January 1, 1950, with respect to all of its employees working in the East Los Angeles Division, including those working at Alameda, has maintained records with respect to such employees of their names, home addresses, occupations and place or places of employment, and has maintained with respect to such employees daily and semi-monthly records of hours worked. Defendant has not, with respect to such employees, maintained records of hours worked in each week or wages paid on a weekly basis. [27]

"(15) Defendant's Alameda warehouse was built on property acquired in 1898 and was constructed shortly thereafter, and at that time was in the center of a prosperous residence area in the city of Los Angeles. Defendant's Figueroa warehouse was constructed on property acquired in 1907, and portions of the same were built between then and 1913, and at such time, Figueroa was adjacent to the leading residence area in Los Angeles which was then along South Figueroa Street. The Crenshaw warehouse was built in approximately 1927 to serve the new residence areas in its area, particularly the Leimert Park area. The Wilshire warehouse was owned by the Wilshire Fireproof Storage Company in which defendant acquired a controlling interest in 1931, and from that time until the present, leased said warehouse from said controlled company. The Wilshire warehouse at the time of its acquisition served the prosperous Wilshire residence area. The Grand Avenue Warehouse was acquired in 1942 to meet unusual requirements for space for storage of household goods resulting from World War II.

"(16) After acquisition of the Alameda warehouse, the surrounding area changed greatly until at the present time it consists entirely of a heavy industrial and commercial neighborhood. The Figueroa warehouse is no longer adjacent to the finest residence area in the city of Los Angeles but has gradually changed to a commercial area with a heavy predominance of automobile dealers and boarding houses. The Crenshaw warehouse is still in the vicinity of substantial residence areas, but their character has deteriorated somewhat. The Wilshire warehouse is no longer adjacent to the finest residence area in Los Angeles, which has moved to other locations, but is still in the center of a substantial residence area. The character of the area surrounding the Grand Avenue warehouse has not changed greatly since its acquisition by

defendant. Because of [28] the changing conditions pertaining to the areas surrounding the warehouses in the East Los Angeles Division, defendant has changed the character of its business in that Division. It now handles some commercial storage at each of these warehouses, although it still handles large amounts of household goods at all of them. It engages in larger moving jobs than formerly, some of them for enterprises such as law firms, hardware companies and commercial operations, which require large amounts of manpower and great flexibility in shifting employees from one job to another. Defendant has developed a record storage business at its Figueroa warehouse and leases substantial portions of its Crenshaw and Wilshire warehouses to a furniture dealer for the sale of furniture. Defendant has attempted to adjust its business in the East Los Angeles Division to meet changing conditions and has done so successfully, but could carry on the operations there as well or better if all of its business were carried on in a single large building instead of five buildings geographically separated.

"(17) All of the management, executive and administrative functions of the East Los Angeles Division are performed by individuals whose principal office and location is at Figueroa and who give direct orders to and supervise the employees at all five warehouses in the East Los Angeles Division. These individuals make daily visits to each of the warehouses in the division. They include a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager and a storage manager. Each of these individuals performs his duties in his respective field for the entire East Los Angeles Division. Together they are responsible for the success of the entire East Los Angeles Division and are responsible for the success of the operations of the Division as a whole. No one is responsible only for the success of Alameda or any one of [29] the other warehouses in the East Los Angeles Division.

"(18) Defendant's East Los Angeles Division maintains moving van equipment at each of the five warehouses in the Division but all of the dispatching of all of them on all moving orders is handled by the dispatching office at the Figueroa main office of the Division, either by personal orders or by telephone orders.

"(19) All of the sales activities of defendant are conducted from the Figueroa warehouse. Defendant has an active sales program which includes 7 salesmen for the East Los Angeles Division who are expected to and do carry on sales efforts and work in individual territories within the territory of the Division which are assigned to them. The territories assigned to the respective salesmen are assigned without relation to the location of the warehouses of the Division but the territories are assigned

on the basis of approximately equal sales potential in each such territory.

"(20) Eighty per cent of the customers of the East Los Angeles Division who deal with it either in person or by telephone do so at or to its Figueroa office. Defendant runs newspaper advertisements advertising its services in which the only phone number of the East Los Angeles Division listed is the telephone number at Figueroa.

"(21) The working force at the East Los Angeles Division is largely interchangeable among the various operating tasks: Most of the drivers are competent as packers and craters and most of the packers and craters are competent as drivers or helpers on moving jobs. These employees are frequently shifted back and forth from one warehouse to another within the East Los Angeles Division; for example, one or more employees are shifted to Alameda on an average of one day per week and one or more employees are shifted from Alameda to another warehouse in the East [30] Los Angeles Division on an average of two days per week.

"(22) The accounting records for defendant's East Los Angeles Division are maintained at the Figueroa office as a single system of accounts and records. The East Los Angeles Division accounting system is the same as that used by defendant for its other districts. If defendant maintained a separate system of accounting records for each warehouse within the East Los Angeles Division, the cost would be more than 100% greater than at present if the system were maintained at each warehouse, and more than 50% greater it the separate records were all maintained at the Figueroa warehouse. No separate accounting records are maintained for the individual warehouses in the East Los Angeles Division because of this greatly increased cost of doing so and because the management has no requirement or need for separate accounting information for each warehouse within the East Los Angeles Division.

"(23) The accounting office of the East Los Angeles Division prepares periodic financial statements including profit and loss statements and balance sheets for the Division as a whole and these are not broken down or classified in any manner for the respective warehouses located within the East Los Angeles Division including Alameda. No financial statement or profit and loss statements are separately prepared or maintained by defendant for Alameda.

"(24) A single set of bank accounts is maintained by defendant for the entire East Los Angeles Division, and all financial transactions, without segregation for the entire Division are handled through said bank accounts. No bank accounts are maintained separately for Alameda. Payroll records are not handled sepa-

rately for Alameda but are maintained at the Figueroa office as a part of the payroll records for the entire Division.

"(25) Defendant purchases in large lots, the following supplies, which after their purchase are stored in one or another of its warehouses until needed, for use of all of its warehouses in the Los Angeles metropolitan area; naphthalen flakes, kraft paper, and towels. All other supplies for the East Los Angeles Division are purchased by the Division in large lots for the use of the entire Division, including the following: boxes, barrels, shredded paper, paper pads, corrugated paper, tissue paper, small tools, office supplies, office furniture and fixtures, business machines, and typewriters. No supplies or materials are purchased by defendant separately for the needs or requirements of Alameda alone. The East Los Angeles Division operates a repair and maintenance shop at Figueroa for all of the automotive equipment which it operates from all warehouses in the Division, and maintains there a single inventory of automotive parts and supplies for the use of the shop.

"(26) It would not be practical, economic or good business practice for defendant to divide its East Los Angeles Division into smaller management, administrative or operating units because (a) the cost of doing so would be much greater than the present costs, (b) the present single administration, management and operation permit much greater flexibility which is required for the kind of business done by the East Los Angeles Division, and (c) the type of work being handled by defendant requires the present method of management, administration and operation.

"(27) All of the employees of defendant working at Alameda are members of a single Local (No. 389) of the International Brotherhood of Teamsters Union, which local includes, without segregation, all of the union employees of the defendant working for its East Los Angeles Division and other divisions in the Los Angeles metropolitan area. A single labor union contract uniformly applies to all of the employees of defendant in [32] its warehouses in the Los Angeles metropolitan area including the East Los Angeles Division. The union contract applicable to all the employees of the East Los Angeles Division provides that the normal work week is 48 hours in 6 days, Monday through Saturday, and provides for no payment of overtime during such work week but does provide for overtime for work in excess of 8 hours in any one day. The contract provides that in the event of any change in this work week, the contract shall be considered open for negotiations regarding wages and hours. The International Brotherhood of Teamsters Union is one of the most powerful unions in the United States. Its representatives are familiar with and keep

in close touch with the business and operating problems of the employers of its members including defendant.

"(28) If defendant were forced to pay overtime to operating employees at its Alameda warehouse for work between 40 and 48 hours per week, this would upset prevailing wage patterns of defendant and create wage inequities between groups of its employees, which, in turn, would have a very serious adverse effect upon the relations of defendant with its employees and upon their morale.

"(29) Defendant handles a substantially greater volume of business at its East Los Angeles Division on Saturdays than on any other day in the week and this is a convenience to the public. If defendant were required to pay overtime for work in excess of 40 hours per week and less than 48 hours in such week, defendant would have to increase its rates and the volume of its business on Saturdays would be substantially decreased. The public has an alternative to the use of defendant's services for the moving of household goods, through the use of trailers and rental trucks. Defendant would not be able to close its Alameda warehouse after its employees there had worked in excess of 40 [33] hours in one work week because the defendant's contract with the International Brotherhood of Teamsters Union provides for a normal work week of 48 hours, Monday through Saturday, and provides for re-opening the contract in the event of a change.

"From the foregoing Findings of Fact, the Court makes the following:

"CONCLUSIONS OF LAW

"(1) The Court concludes in all respects as set forth in the foregoing Findings of Fact and any Conclusion of Law that is contained therein is hereby expressly incorporated in these Conclusions of Law with the same force and effect as though expressly set forth therein.

"(2) Defendant's East Los Angeles Division is a single establishment within the meaning of section 13 (a) (2) of the Fair Labor Standards Act (29 U. S. C., sec. 213 (a) (2) and its Alameda warehouse is not alone a single establishment within the meaning of said section.

"(3) All of the employees of defendant at its Alameda warehouse are employed by a retail or service establishment as defined in section 13 (a) (2) of the Fair Labor Standards Act (29 U. S. C., sec. 213 (a) (2) and therefore are exempt from the requirements of sections 6 and 7 of said Act (29 U. S. C., sec. 206 and 207)."

In United States Court of Appeals for the Ninth Circuit

No. 14618

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

BEKINS VAN & STORAGE COMPANY, A CORPORATION, APPELLEE

Judgment

March 1, 1956

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

No. 122, October Term, 1956

Order allowing certiorari

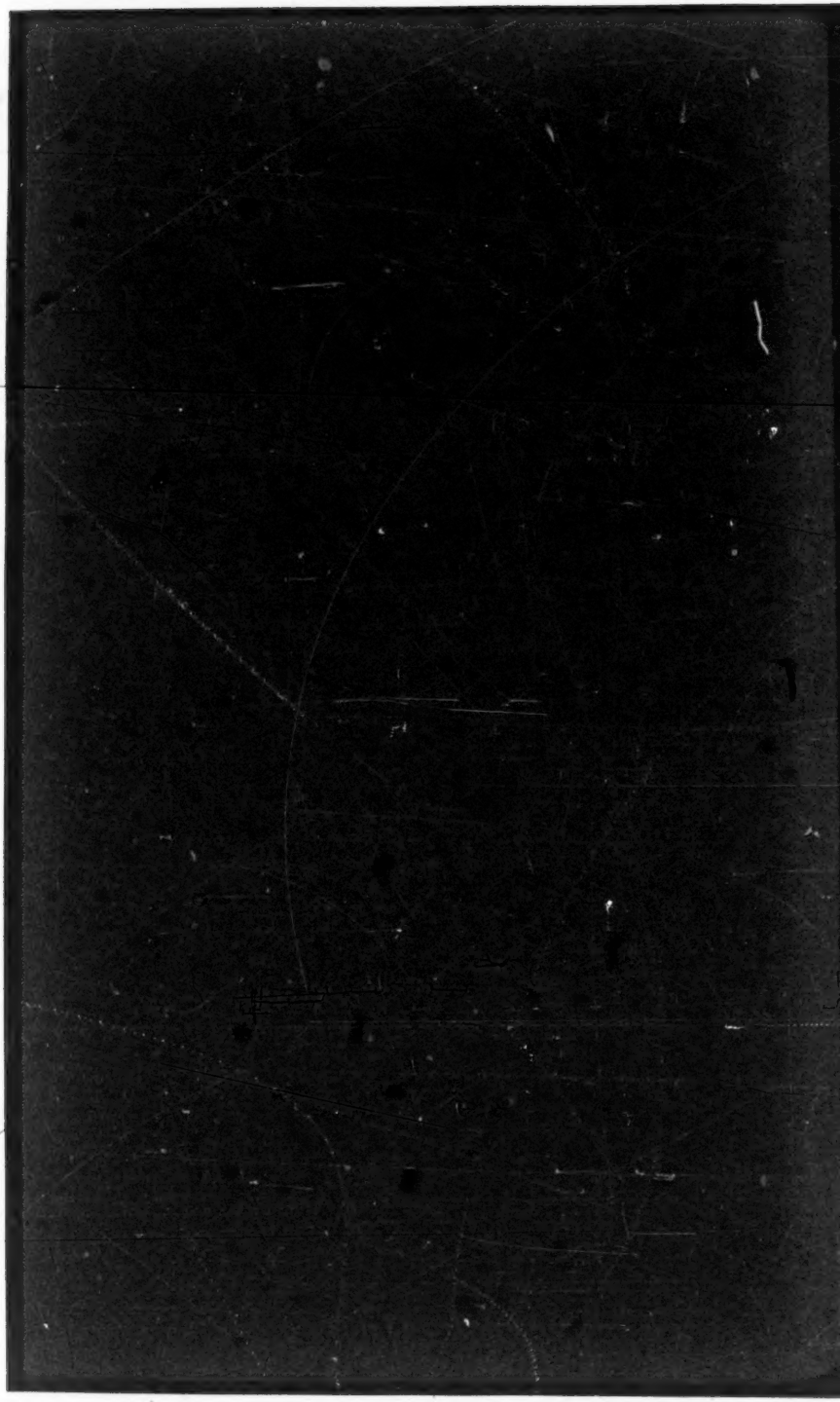
Filed October 8, 1956

[Title omitted.]

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1956



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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BEKINS VAN AND STORAGE COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on March 1, 1956.

OPINIONS BELOW

The findings of fact and conclusions of law (R. 34–49; App. A, *infra,* 29–43) and the oral opinion of the District Court (R. 139–147) are not officially reported. The opinion of the Court of Appeals (App. A, 25–28) is reported at 231 F. 2d 25.

JURISDICTION

The judgment of the Court of Appeals (App. A, 44) was entered March 1, 1956. The jurisdic-

tion of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are set forth in full in Appendix B, *infra,* pp. 45–48. The provision particularly involved here is Section 13 (a) (2) which reads as follows:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

QUESTION PRESENTED

Whether five large physically-separate storage warehouses, including a central office which serves all five warehouses, constitute a single "retail establishment" within the meaning of the exemption provided by Section 13 (a) (2) of the Fair Labor Standards Act.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime and record keeping provisions of the Act with respect to employees employed in its Alameda warehouse in the city of Los Angeles, California (R. 3–5). The warehouse in question is one of a large chain of storage warehouses operated by respondent, which engages in an extensive moving and storage business, with offices or agents in all principal cities (R. 35, 119). Respondent is the largest storage company in the United States, and its business includes the moving and storage of household goods, the moving of complete offices, stores and commercial and industrial operations, the storage of commercial goods, and the renting and leasing of office and building space (Fdg. 4, R. 35; App. A, p. 30). In California, it owns and operates 36 warehouses, at each of which employees are regularly engaged in handling, packing, and storing goods substantial quantities of which have been, and are being, received from out-of-State points and have been, and are being handled, packed, shipped, delivered, transported, and offered for transportation to out-of-State points (Fdg. 5, R. 35). These warehouses, located in various parts of the State, are grouped into 19 divisions or districts (R. 11, 36), each with a main office patterned after respond-

ent's general office (R. 36, 61–62). The offices for the various divisions perform all management, executive, and administrative functions for the warehouses within their jurisdiction (R. 42–43) and are responsible to respondent's general office or top management for the successful operation of such warehouses (R. 69).

1. The Alameda warehouse and four other physically-separate warehouses together with a division central office (located in one of the warehouses) comprise what is known as respondent's East Los Angeles Division (Fdg. 10, R. 37–38). These warehouses are geographically scattered over an area of about six miles, each warehouse being from 1¾ miles to 6 miles distant from the others (Gov't. Exh. 2). There is no dispute as to the substantial interstate character of the activities at all of the warehouses, nor is there any dispute that the Alameda warehouse, standing alone, engages substantially in non-retail storage in sufficient volume to disqualify it for the "retail establishment" exemption of Section 13 (a) (2) of the Act, if it is regarded as a single establishment. The parties stipulated and the District Court found that Alameda, standing alone, if it is a single "establishment" within the meaning of Section 13 (a) (2), does not meet the percentage tests prescribed in that section, *i. e.*, admittedly 50 percent or more of its annual dollar volume of sales of service is made outside the

State and admittedly more than 25% is non-retail in character. It was also stipulated, on the other hand, that if the "East Los Angeles Division", rather than each separate warehouse, constituted the "establishment," the division does meet the percentage tests of the exemption (Fdg. 2, R. 34; Stip. R. 18).

2. Alameda is a large five story, reinforced concrete building containing approximately 60,000 square feet of space (Fdg. 13, R. 39; App. A, pp. 34–35). It is located approximately 1¾ miles from the warehouse which houses the "Division" office and from 1.8 to 3.5 miles from the other three warehouses (Fdg. 10, R. 38; App. A, p. 33). Unlike some of respondent's other warehouses which are located in residential areas from which they draw most of their business, the Alameda warehouse is located in the heart of the industrial area of Los Angeles on a spur track of the Southern Pacific Railroad where freight cars are regularly received and dispatched (Fdg. 15–16, R. 41; App. A, pp. 35–36; R. 129, 124; Stip. R. 12). In addition to the moving van equipment and loading docks which all of the warehouses have, Alameda is equipped with a railroad siding and railway loading docks to accommodate the loading and unloading of freight cars (Fdg. 13, R. 39; Fdg. 18, R. 43).

Although, when originally constructed over a half century ago (1898), the Alameda warehouse

was in a residential section (R. 40, 126), the surrounding area now "consists entirely of a heavy industrial and commercial neighborhood" (Fdg. 16, R. 41). Because of the change in Alameda's environment, respondent has changed the character of the business done there to accommodate the customers in its immediate proximity (Fdg. 16, R. 42), with the result that this warehouse admittedly is no longer used essentially for storage of household goods as it once was. While the record does not disclose in detail the precise nature of Alameda's non-retail functions (the stipulation of their non-retail character made such evidence unnecessary), it appears that Alameda engages substantially in the general "storage of commercial goods" such as "phonographs and radios and washing machines, and things like that" for the business concerns located in its environs which "consists entirely of heavy industrial and commercial" enterprises (Stip. R. 18; Fdg. 16, R. 41, 129).

3. Alameda, like each of respondent's other warehouses, has its own foreman in charge of its physical operations, and its own separate crew of regular employees, although there is some interchange of employees among the several warehouses in the "Division" (Fdg. 13, R. 40; Stip. R. 13–14). The administrative management of Alameda, however, is organizationally integrated with the management of the other warehouses of

the "Division." The executive, administrative, and clerical functions for the whole "Division" are performed by a central office located in one of the warehouses known as "Figueroa." The "Division" office is composed of a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager, and a storage manager who perform their respective duties for the whole "Division" (Fdg. 17, R. 42–43; App. A, p. 17). In addition, the "Division" office employees keep the payrolls, handle all the accounting, do the banking, carry on an active sales program, and purchase the maintenance and operational materials and supplies (Fdgs. 19, 22–25, R. 43, 44–46; App. A, pp. 38, 39–40).

4. The District Court held that respondent's whole East Los Angeles Division—consisting of Alameda, four other warehouses, and a central office—constitutes a single "establishment" within the meaning of the exemption contained in Section 13 (a) (2) of the Act and dismissed the complaint (R. 49, 50). The Court of Appeals affirmed, holding that "the proprietor's unit of operation and control may be considered * * * in determining what is an establishment." In arriving at this conclusion, the court held that this Court's decision in *Phillips, Inc.* v. *Walling,* 324 U. S. 490, did not hold that "if a business is in separate buildings, each building is necessarily an

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establishment," but that the rationale of *Phillips* was limited to the specific type of non-retail function there involved, *i. e.* "the warehouse function [which] historically had been that of independent wholesalers or wholesalers independent of retail grocers" (App. A, p. 27).

REASONS FOR GRANTING THE WRIT

The decision below is plainly inconsistent with this Court's holding in *Phillips, Inc.* v. *Walling,* 324 U. S. 490, that the word "establishment", as used in Section 13 (a) (2) of the Fair Labor Standards Act (*supra,* p. 2), means "a distinct physical place of business" and not "an entire business or enterprise" of a "multi-function" chain organization. 324 U. S. at 494, 496. Not only has the term "establishment" been consistently so construed administratively since the original enactment of the Act, but it was expressly approved by Congress at the time of the passage of the 1949 Amendments to the Act. The decision below is also in conflict with rulings of several other Courts of Appeals which have applied *Phillips* to various types of chain and multi-unit organizations. If left unreviewed, the decision can thus serve only to confuse and unsettle a large and important area of the Act's application which had previously been regarded as well settled.

1. The inconsistency of the decision below with this Court's opinion in *Phillips, Inc.* v. *Walling,*

supra, seems patent to us; the court below itself admits that its construction of *Phillips* "may be an over-simplification" (App. A, pp. 26–27. The court simply ignores this Court's specific holding that the very terms of Section 13 (a) (2), as well as the purpose of the exemption, show that "Congress used the word 'establishment' as it is normally used in business and in government—as meaning a distinct physical place of business," and that therefore each of the 49 stores of the Phillips chain, as well as the separate warehouse, was a separate establishment (324 U. S. at 496), regardless of the degree of integration of their functions and control and regardless of the fact that the "prime function" of the chain system as a whole was to sell at retail. Indeed, the concept of the separate physical establishment was held to be the "essential key to the problem" of determining the application of the exemption to the "hybrid" "multi-function" chain organization (*id.* at 494–496).

The Ninth Circuit's attempt to limit *Phillips* to the specific type of non-retail function there involved—*i. e.,* a function historically performed by the "independent wholesaler or middleman"—not only misconceives the basic stress of that decision on the separate physical establishment but also fails to recognize that factually the non-retail functions performed by a commercial storage warehouse, such as respondent's Alameda unit, are in this same "wholesaler" category.

Warehousing of commercial goods is known in the trade as warehousing of "general merchandise", as distinguished from "household goods and furniture." See Frederick, *Public Warehousing,* pp. 15–16. "General merchandise warehouses" are defined as those used "for *the storage of merchandise and commodities by manufacturers or other shippers until the goods are required by retailers, distributors, or industrial and household consumers.* * * * General merchandise warehouses are frequently referred to as distribution warehouses. *They really act as service links between the producer and consumer." Ibid.* [Emphasis added.] Therefore, there is no factual basis for the court's assumption that the admittedly non-retail functions of respondent's Alameda warehouse are substantially different from the "wholesaler" functions of the *Phillips* warehouse.[1]

[1] The record shows that the Alameda warehouse engages substantially in the general "storage of commercial goods" (including "phonographs and radios and washing machines, and things like that," R. 129) for business concerns located in the "heavy industrial and commercial neighborhood" in which the warehouse is located (Stip. R. 10–11; Fdg. 16, R. 41–42; see also Gov't Exh. 1, including pictures of Alameda with "commercial storage" prominently marked on the outside wall of the building).

The fact that the warehouse performs its non-retail functions for independent industrial and business concerns, rather than for its own retail outlets, clearly does not suffice to distinguish the *Phillips* case. On the contrary, independent warehouse functions would *a fortiori* be outside the scope of the exemption, as is evident from the emphasis in *Phillips* on the analogy of the independent warehousing and wholesaling function. Similarly, the fact that the non-retail functions are here combined for administrative and management purposes with the company's retail functions is no more reason for applying the exemption than there was for exempting the non-retail warehousing functions which were organizationally integrated, indeed "completely meshed," with *Phillips'* retail operations (324 U. S. at 494–495).

Plainly, the treatment as a single establishment of five large widely-separated units, admittedly varying in the nature of their functions depending upon their surroundings and equipment, is inconsistent with the concept of "small local retail establishments, epitomized by the corner grocery, the drug store and the department store," which this Court pointed out in *Phillips* "were the sole concern of Congress in Section 13 (a) (2)" (324 U. S. at 497–498). As the Court expressly noted, the original language of the proposed exemption applied to

retail "industry," but "the exemption as it finally emerged from the joint House-Senate conference committee applied to any retail 'establishment' rather than 'industry' " because "[t]he use of the word 'establishment' is more appropriate to the small local retailers which Congress had in mind and clearly indicates that Congress meant by it something less or different than 'industry' or 'enterprise' " (*id.* at 497, n. 7).

2. Any doubt of the soundness of this construction of the word "establishment" in Section 13 (a) (2) as referring to each physically-separate unit of a chain enterprise was dispelled by the specific expression of legislative approval at the time of the enactment of the 1949 amendments. See the Statement of the majority of the Senate conferees that the *Phillips* definition of "establishment" as "a physically separate place of business" was to be retained (95 Cong. Rec. 14877):

> * * * Under the present law (*Phillips* v. *Walling* (324 U. S. 490)) *a retail establishment means a physically separate place of business which possesses the characteristics of a retailer and does not mean an entire business enterprise. The conference agreement in no way changes the meaning of the term "establishment."* [Emphasis added.]

And Senator George, one of the sponsors of the amendment to Section 13 (a) (2), made the same point (95 Cong. Rec. 12579):

> * * * I wish to say that the word "establishment" has been very well defined in the Wage and Hour Act. It means now a single physically separate place of business which possesses the characteristics of a retailer and it does not mean an entire business enterprise.

Moreover, the consistent administrative interpretation of the term "establishment" as meaning "each physically separated unit" of a chain or multi-unit organization (see App. C, *infra*, pp. 47–48) was outstanding when the 1949 amendments were enacted. Thus, in addition to the above-quoted express approval of the *Phillips* decision adopting this administrative interpretation, this construction was legislatively reaffirmed by Section 16 (c) of the 1949 amendments (c. 736, 63 Stat. 910, 916 (c)) which provided that all administrative interpretations in effect at the time and not inconsistent with the amendments "shall remain in effect." See *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254; *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16–17. Thus, even if the *Phillips* decision were reasonably susceptible to the Ninth Circuit's construction, the decision below is contrary to the now settled meaning of the term "establishment" as used in this exemption.

3. The decision below is also contrary to the well-established principle—reaffirmed repeatedly in this Court's rulings construing various exemptions from this Act and specifically stressed with respect to the very exemption here in question—that any exemption from this remedial legislation must be "narrowly construed" and limited to situations "plainly and unmistakably within its terms" (*Phillips, Inc.* v. *Walling, supra; Powell* v. *United States Cartridge Co.,* 339 U. S. 497, 517; *Addison* v. *Holly Hill Co.,* 322 U. S. 607, 617). The departure by the court below from this principle deserves more than passing notice because the Ninth Circuit, not only in the instant case but in several others of its decisions, appears to have adopted the diametrically opposite approach of regarding exemptions as "remedial" and, therefore, to be broadly construed. See *Waialua Agricultural Co.* v. *Maneja,* 216 F. 2d 466 at p. 470–471 (C. A. 9), reversed, 349 U. S. 254; *McComb* v. *Hunt Foods,* 167 F. 2d 905 at 906 (C. A. 9), certiorari denied, 335 U. S. 845; see also *Mitchell* v. *King Packing Co.,* 216 F. 2d 618 (C. A. 9), reversed, 350 U. S. 260. The principle of strict construction of the exemptions is essential if the Act is to have the "sufficiently broad coverage" that is "vital to its mission" and basic purpose "to eliminate substandard conditions * * * on a wide scale throughout the nation." *Roland Co.* v. *Walling,* 326 U. S.

657, at 669, 670; *Powell* v. *United States Cartridge Co.*, 339 U. S. at 510, 516–517.

4. In ignoring the basic ruling of the *Phillips* decision and the impact of the 1949 Amendments, the decision below not only reopens a far-reaching problem which for a long period of years had caused extensive confusion and litigation before it was finally settled by *Phillips*, but it also creates a present conflict with the First, Third, Sixth, Seventh, and Eighth Circuits. In effect, the Ninth Circuit has reverted to its earlier decision in *Walling* v. *Block*, 139 F. 2d 268, which was overruled by *Phillips*.[2] The *Phillips* decision has since been consistently applied by the Courts of Appeals to cases involving a variety of chain and multi-unit organizations comparable to respondent's. *Armstrong Co.* v. *Walling*, 161 F. 2d 515 (C. A. 1); *McComb* v. *W. E. Wright Co.*, 168 F. 2d 40 (C. A. 6), certiorari denied, 335 U. S. 854; *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C. A. 6); *Montgomery Ward & Co.* v. *Antis*, 158 F. 2d 948 (C. A. 6), certiorari denied, 331 U. S. 811; *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475 (C. A. 7), certiorari denied, 328 U. S. 854; *Mit-*

[2] Certiorari was granted in *Phillips* because of the conflict in reasoning between the First Circuit's *Phillips* decision and the Third Circuit's decision in *Walling* v. *American Stores Co.*, 133 F. 2d 840, on the one hand, and *Walling* v. *Block*, *supra*; *Walling* v. *L. Wiemann Co.*, 138 F. 2d 602 (C. A. 7), and *Allesandro* v. *C. F. Smith Co.*, 136 F. 2d 75 (C. A. 6), on the other hand (see 324 U. S. at 493, n. 1).

chell v. *E. G. Shinner & Co.*, 221 F. 2d 260 (C. A. 7); *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C. A. 8); *Fred Wolferman, Inc.* v. *Gustafson*, 169 F. 2d 759 (C. A. 8).

All of these decisions, involving various types of multi-unit organizations, were predicated on the basis that each distinct place of business is a separate "establishment." Insofar as the decision below includes central office employees within the exemption,[3] it is in direct conflict, both factually and in legal principle, with the *Phillips, Wright, Goldblatt* and *Shinner* cases, *supra*, all of which held that physically distinct central accounting, sales, and executive offices servicing several retail outlets were not exempt, regardless of the degree of functional integration with the operations of the retail outlets. In the *Wright* case, *supra*, the Sixth Circuit held the exemption inapplicable to the central offices, although they were located on the top story of the same building in which extensive retail functions were carried on. Similarly, in the *Goldblatt* case, *supra*, the Seventh Circuit held the exemption in-

[3] Respondent's central office is not located in the Alameda warehouse but is located in one of the other warehouses (Figueroa) included in the same "Division" held by the court below to constitute an exempt "establishment." Because the company was complying with respect to these office employees at the time suit was instituted, no issue was raised as to their status. However, the decision below, holding the entire "Division" exempt, now obviously invites non-compliance with respect to the office employees also.

applicable to the central offices although they were in the same building as one of the retail stores (152 R. 2d at 478). Thus, in this respect these cases are indistinguishable factually from the present one.

Also, contrary to the decision below, other Courts of Appeals have not considered the *Phillips* principle to be limited to the same kind of "wholesaler" functions as in that case. In *Armstrong, supra,* the inapplicability of the exemption was recognized with respect to a physically-separate warehouse servicing a chain of refreshment stands in various railroad stations, and it was also held inapplicable to a commissary located in one of the railroad stations but preparing food for the various refreshment stands of the chain. There, too, the company contended that *Phillips* was limited to the warehouse, claiming that the commissary "was part of one retail establishment" composed of the stands located in the same station as the commissary. In rejecting this argument, the First Circuit pointed out that the "commissary is integrated with, but physically distinct from, the stands in the station * * *. It is a distinct place of business * * *" (161 F. 2d at 516). Similarly, in *American Stores, supra,* the exemption was held inapplicable not only to the central office and warehouse, which performed wholesale functions like *Phillips,* but also to units engaged in various other

non-retail (manufacturing and processing) operations. In the *Wolferman* case, *supra,* the Eighth Circuit also held the exemption inapplicable to a kitchen located in one of the retail outlets but engaged in making candy and salad dressing for other retail outlets as well. Thus, these courts have recognized the *Phillips* rationale as applicable to any physically-separate non-retail unit of a multi-function business.

5. The broad construction adopted by the court below for the retail establishment exemption, and for the term "establishment", presents a dangerous threat to the scope and objectives of the Act because of the unlimited potentialities for expanding not only the Section 13 (a) (2) exemption but also the related exemptions added by the 1949 Amendments—Sections 13 (a) (3) and 13 (a) (4) (App. B, *infra,* pp. 45–46)—which occasioned lengthy legislative discussions in large part because of this possibility (see *e. g.,* 95 Con. Rec. 11200, 11216, 12498–12506, 12510–12519, 12533–12534, 12579, 14942). Indeed, it was because of these potentialities that the sponsor of the Section 13 (a) (4) exemption so explicitly stated (see the quotation *infra,* p. 20) that the exemption was premised on the restrictive meaning of the term "establishment," as construed in the *Phillips* case, "so as to safeguard against any abuses * * *" and "not to embarrass the administrators of the Act by bringing in the large producers who might

be extensive manufacturers, but only small retailers, who are strictly retailers * * *" (95th Cong. Rec. 12579).

Section 13 (a) (2) alone presents many situations, apart from the typical retail chain warehouse involved in the *Phillips* case, in which the decision below, if unreviewed, will cause great confusion and uncertainty, since there are many multi-unit businesses engaged in various processing and other non-retail functions not strictly analogous to the typical retail chain warehouse. The Ninth Circuit's decision, which would permit large chain businesses to combine non-retail units with retail units, depending solely on the proprietor's self-serving plan of organization, would give chain organizations the same kind of competitive advantage in labor costs, with corresponding discrimination against their employees, which this Court, in the *Phillips* case, held to be contrary to the terms and spirit of Section 13 (a) (2). Respondent, for example, engages in a combined business including storage of both household goods and commercial merchandise and thus competes with warehouses engaged solely or essentially in commercial storage, which admittedly is not exempt. Statistics furnished by the United States Bureau of Census show that 1,197 storage warehouses employing 22,204 employees, with a total annual payroll of $81,226,000, are in the category of "general merchandise" ware-

houses. Statistics are not available to show how many of these warehouses are operated by chain organizations like respondent's.

The importance of the "establishment" issue is increased by the two new exemptions, added to the Act in 1949. Section 13 (a) (3) provides an exemption for laundry and dry cleaning "establishments" and Section 13 (a) (4) provides one for retail "establishments" which make or process the goods they sell. With respect to the latter exemption, "the possibilities of abuse" by a broad construction of the term "establishment" were specifically recognized in the legislative debates (95 Cong. Rec. 12579; see *supra*, p. 18). The decision below opens the door to these "possibilities of abuse" and thus aggravates an already difficult enforcement problem. The exemption permits a "retail establishment" to make or process the goods that it sells, but the goods must be sold at the "establishment" where they are made or processed. Under the Ninth Circuit's decision, an organization which makes or processes goods in one building or location and sells them through sales outlets in other buildings or locations might nonetheless qualify for exemption, depending on the "proprietor's unit of operation and control" of the separate units as an integrated business.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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STUART ROTHMAN,
Solicitor,

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United States Department of Labor.

MAY 1956.

APPENDICES

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APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 14,618
Mar. 1, 1956

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

vs.

BEKINS VAN & STORAGE COMPANY, A CORPORATION, APPELLEE

Appeal from the United States District Court for the Southern District of California, Central Division

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges.

CHAMBERS, Circuit Judge:

Bekins pays its employees at its Alameda warehouse in downtown Los Angeles on a basis of 48 hours per week without overtime for work in excess of 40 hours per week. The Secretary of Labor says this is wrong and seeks overtime pay for the employees at this one warehouse because of its high percentage of interstate business at this one place considered alone. Bekins replies that the Alameda warehouse is one of five

scattered warehouses in downtown Los Angeles which it operates as a unit known as the East Los Angeles Division. If the one warehouse classifies as an "establishment," the Secretary of Labor is right.* If the "establishment" is Bekins unit of five warehouses, he is wrong, because more than half of the total business of the five warehouses is local, intrastate, a service, and possibly retail.

The district court ruled in favor of Bekins and the secretary has appealed.

For a full understanding of the case, one should read the findings of fact and conclusions of law of the district court which are hereinafter set forth as an appendix to this opinion.

For reversal, the secretary relies principally upon Phillips vs. Walling, 324 U. S. 490. That was the case of overtime pay for the warehouse employees in one warehouse which received groceries in interstate commerce and distributed them to some of the company's chain stores in Massachusetts and Connecticut. The wage provisions of the Federal Fair Labor Standards Act were held to be applicable and the employees not within any exception.

Naturally, if the Phillips case is apposite, this court must follow it. But, to this court, (and it

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*The section involved, 29 U. S. C. A. 213, so far as pertinent, reads as follows:

"§ 213. *Exemptions.*

"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *."

may be oversimplification to say so) it seems that the rationale of the Phillips case lies in the fact that the warehouse function historically had been that of independent wholesalers or wholesalers independent of retail grocers. The impact of the act was not to be avoided by setting up of an "integration" of wholesale and retail functions. Phillips warehousemen should have the same protection the warehousemen have in warehouses not integrated with the retail selling operation.

This court does not believe Phillips to be necessarily controlling and affirms the trial court. If Phillips holds that if a business is in separate buildings, each building is necessarily an establishment then, of course, this court is wrong. It hardly seems though that Phillips goes that far.

Here the defendant's pattern of business with central control at one of the area warehouses existed before the adoption of the act. No one suggests that Bekins has adjusted its business to try to get around the act. The unit of operation of Bekins seems to be the "division." Doubtless, the secretary would not take the position he does here if the buildings were side by side, although separate. It does not seem unreasonable to consider the five warehouses, generally in downtown Los Angeles within a limited radius, as one establishment.

Geography may well play quite a role. Probably, if the buildings were to be found scattered in San Diego, Los Angeles, Long Beach, Pasadena, Santa Barbara, Bakersfield, San Bernardino, and Riverside (with central control at one office) the trial court's conclusions would be clearly erroneous.

To this court, an important factor here is that if it were not for financial or capital problems and the necessity of using what one has, it would be quite feasible to conduct, and Bekins probably would conduct, the business of the five warehouses in one central warehouse under one roof.

This court believes that, although there is no real dispute on facts, the trial court still was entitled to appraise the facts and make a determination as to which facts really pointed to "one establishment" and which pointed to "separate establishments."

The decision here is simply that it is possible for one business located in several buildings, neither contiguous nor widely scattered, to be one establishment and that the proprietor's unit of operation and control may be considered, in a case like this one, in determining what is an establishment.

Here the trial court found one establishment. The proprietor's historical unit of operation and control were considered. His natural business policy was given weight by the trial court. However, these factors were not used mechanically or given conducive force. These were some of the shadings in a problem of fact.

This court does not join the district court in chiding the Secretary of Labor for bringing the ateion when the individuals concerned are members of a strong union, the Teamsters, presumably able to protect the men. Bekins and the Teamsters cannot get together and set aside the positive policy of the act.

Affirmed.

(Endorsed:) Opinion. Filed Mar. 1, 1956.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX

[TO OPINION OF THE COURT OF APPEALS]

Findings of fact and conclusions of law of district court

"FINDINGS OF FACT

"(1) Plaintiff does not contend that any of defendant's warehouses either in the East Los Angeles Division or elsewhere fail to meet the tests of exemption as a retail or service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act, as amended, except only the Alameda warehouse. [22]

"2) The East Los Angeles Division of defendant, including Alameda, is a single establishment within the meaning of section 13 (a) (2) of the Fair Labor Standards Act (29 U. S. C., sec. 213 (a) (2), the business activities of which are to be considered together as a unit, and as such an establishment, more than 50 percentum of its annual dollar volume of sales of goods or services is made within the state in which it is located and 75 percentum of its annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry. Such tests are not met in the case of the Alameda warehouse considered separately.

"(3) All of the employees of defendant's East Los Angeles Division, including those at Alameda, are employed by a retail or service establishment which qualifies with the requirements of section 13 (a) (2) of the Fair Labor Standards Act (29 U. S. C., sec. 213 (a) (2).

"(4) Defendant is, and has been since 1950, and long prior thereto, a California corporation, having its principal office and place of business located at 1335 South Figueroa Street, Los Angeles, California. The business of defendant includes the moving and storage of household goods, the moving of used office equipment and furniture, the moving of complete offices, stores and commercial and industrial operations, rug cleaning, fur storage, rental of office and building space and storage of commercial goods. Defendant owns approximately 20 per cent of the stock of Bekins Van Lines Co., which is a motor common carrier of household goods throughout the United States.

"(5) Defendant operates 36 warehouses which are grouped in 19 divisions or districts in various cities within the State of California, and at each warehouse employees are regularly engaged in the storage, cartage, packing and shipping of household goods, and each is used as a terminal point for the moving by motor van of household goods both locally and for long distances. All of said warehouses except one regularly engage in the receiving, storing and delivery of commercial goods. Ten of them have railroad sidings. Substantial quantities of the goods handled, packed and stored by defendant at its various warehouses have been, and are being, received from points in other states and outside the United States and have been, and are being, handled, packed, shipped, delivered, transported, and offered for transportation to points in other states and outside the United States.

"(6) The business of defendant was commenced in 1895 in Los Angeles, California. Thereafter, the company grew and expanded principally with respect to moving and storage of household goods until in 1945 it was operating moving and storage warehouse businesses with warehouses in the principal cities in the State of California.

"(7) In 1946 and thereafter until the present time, defendant continued rapid expansion and growth of its business and facilities. It built approximately twenty new warehouses or warehouse additions during that period in many cities in California. It attempted to provide warehouse facilities by new construction to serve rapidly growing and expanding residence neighborhoods.

"(8) In connection with its expansion from its beginning until the present time, it has been the policy of defendant to decentralize its management to the maximum extent possible. It is defendant's belief that moving and storage service can best be provided at its numerous warehouses through a local organization at the various locations which has full responsibility for all phases of the service provided. Defendant has therefore divided its warehouses into 19 divisions or districts, each of which has a district manager in charge who is responsible for all of its operations. In the Los Angeles [24] area, defendant has such district offices in its East Los Angeles Division, its Hollywood District, Beverly Hills District, Compton-Lynwood District, Glendale District, Wilmington District, which includes Hermosa and Redondo; Inglewood District, Long Beach

District, San Fernando Valley District, Pasadena District, Santa Ana District and Santa Monica District. The management of defendant believes in, and has adopted, adequate and thorough record keeping and control systems to measure the performance and success of its various district offices.

"(9) Originally in defendant's operations in the Los Angeles metropolitan area, it was organized with a West Los Angeles Division and an East Los Angeles Division. The West Los Angeles Division included Hollywood, West Hollywood, Beverly Hills and Santa Monica, and the East Los Angeles Division included the warehouses at Alameda, Figueroa, Crenshaw, Wilshire and Grand Avenue which still are included in the East Los Angeles Division. Prior to 1946, following defendant's policy of decentralization, the West Los Angeles Division was divided into the Hollywood, Beverly Hills, and Santa Monica districts with separate district managers at each one. In 1946 and again in 1950, the executive management of defendant gave thorough consideration to the dividing into smaller units of the East Los Angeles Division and after considering the facts decided that it was not practical nor feasible to divide the East Los Angeles Division consisting of five warehouses into smaller units.

"(10) Defendant's East Los Angeles Division consists of five warehouses in the central part of the city of Los Angeles. The photographs in plaintiff's Exhibit 1 are reasonable respresentations of the exteriors of the five warehouses in the East Los Angeles Division. The main office and one warehouse of this division is at 1335 South

Figueroa Street, herein called "Figueroa." The other warehouses are located at [25] 3625 South Grand Avenue (herein called "Grand Avenue"), 4174 West Pico Street (herein called "Crenshaw"), 116–122 South Western Avenue (herein called "Wilshire"), and Fourth and Alameda Street (herein called "Alameda"). The Alameda Warehouse is approximately 1¾ miles from Figueroa, and the others are from 1.8 to 3.5 from Figueroa. Defendant's general office for the entire business is located at Figueroa. Plaintiff's Exhibit 2 is a map of the city of Los Angeles showing the locations marked with red pencil of the five warehouses in the East Los Angeles Division.

"(11) Each of the warehouses included in the East Los Angeles Division contains warehouse space, loading docks, packing equipment and yard area for the servicing and operation of household goods motor vans, as well as for accommodating motor trucks. The Alameda and Grand Avenue warehouses are equipped with a railroad siding. Upon plaintiff's Exhibit 2 is marked in blue pencil the approximate area which has been officially designated by defendant as the territory to be served by the East Los Angeles Division to the exclusion of defendant's other districts in the Los Angeles metropolitan area. The East Los Angeles Division is responsible for providing moving and storage and other services in this territory but this territory is not further subdivided or broken down as to services to be rendered by any particular warehouse within the East Los Angeles Division.

"(12) Defendant has numerous employees working for its East Los Angeles Division and rendering services of the type herein described. Eleven of these employees work at the Alameda warehouse of defendant. Of said 11 employees, 8 work hours in many work weeks in excess of 40 hours and less than 48 hours but do not receive overtime compensation for such hours worked in excess of 40 hours. Of the remaining 3 employees at Alameda, [26] one is specifically exempted from Section 6 and 7 of the Fair Labor Standards Act by section 13 (a) (1) thereof, as a bona fide executive employee, and two are office workers who are paid by defendant by the hour and regularly work 48 hours per week with time-and-one-half pay for hours in excess of 40 per week.

"(13) The Alameda warehouse is a five-story reinforced concrete building of approximately 60,000 square feet consisting of office space about 15 x 30 feet, truck and van loading docks, railway loading docks, and five storage areas. There are two office employees at Alameda whose duties generally consist of the following: preparing documents used in connection with receipt and delivery of storage lots, maintaining stock cards on commercial storage, answering the telephone, figuring storage rates, preparing warehouse receipts and carrying on other comparable clerical work. There is one warehouse foreman at Alameda whose duties generally consist of the following: physically handling and moving stored goods, checking stored goods in and out of the warehouse, supervising other warehouse employees, opening and closing the building, carry-

ing on fire prevention measures, supervising and working on loading and unloading of freight cars, reporting incompetent work to supervisors, selecting locations in the warehouse for storing goods, and performing minor clerical work in connection with receipt and delivery of stored goods.

"(14) Defendant, since January 1, 1950, with respect to all of its employees working in the East Los Angeles Division, including those working at Alameda, has maintained records with respect to such employees of their names, home addresses, occupations and place or places of employment, and has maintained with respect to such employees daily and semi-monthly records of hours worked. Defendant has not, with respect to such employees, maintained records of hours worked in each week or wages paid on a weekly basis. [27]

"(15) Defendant's Alameda warehouse was built on property acquired in 1898 and was constructed shortly thereafter, and at that time was in the center of a prosperous residence area in the city of Los Angeles. Defendant's Figueroa warehouse was constructed on property acquired in 1907, and portions of the same were built between then and 1913, and at such time, Figueroa was adjacent to the leading residence area in Los Angeles which was then along South Figueroa Street. The Crenshaw warehouse was built in approximately 1927 to serve the new residence areas in its area, particularly the Leimert Park area. The Wilshire warehouse was owned by the Wilshire Fireproof Storage Company in which defendant acquired a controlling interest in 1931,

and from that time until the present, leased said warehouse from said controlled company. The Wilshire warehouse at the time of its acquisition served the prosperous Wilshire residence area. The Grand Avenue Warehouse was acquired in 1942 to meet unusual requirements for space for storage of household goods resulting from World War II.

"(16) After acquisition of the Alameda warehouse, the surrounding area changed greatly until at the present time it consists entirely of a heavy industrial and commercial neighborhood. The Figueroa warehouse is no longer adjacent to the finest residence area in the city of Los Angeles but has gradually changed to a commercial area with a heavy predominance of automobile dealers and boarding houses. The Crenshaw warehouse is still in the vicinity of substantial residence areas, but their character has deteriorated somewhat. The Wilshire warehouse is no longer adjacent to the finest residence area in Los Angeles, which has moved to other locations, but is still in the center of a substantial residence area. The character of the area surrounding the Grand Avenue warehouse has not changed greatly since its acquisition by defendant. Because of [28] the changing conditions pertaining to the areas surrounding the warehouses in the East Los Angeles Division, defendant has changed the character of its business in that division. It now handles some commercial storage at each of these warehouses, although it still handles large amounts of household goods at all of them. It engages in larger moving jobs than formerly, some of them for enterprises such as law firms,

hardware companies and commercial operations, which require large amounts of manpower and great flexibility in shifting employees from one job to another. Defendant has developed a record storage business at its Figueroa warehouse and leases substantial portions of its Crenshaw and Wilshire warehouses to a furniture dealer for the sale of furniture. Defendant has attempted to adjust its business in the East Los Angeles Division to meet changing conditions and has done so successfully, but could carry on the operations there as well or better if all of its business were carried on in a single large building instead of five buildings geographically separated.

"(17) All of the management, executive and administrative functions of the East Los Angeles Division are performed by individuals whose principal office and location is at Figueroa and who give direct orders to and supervise the employees at all five warehouses in the East Los Angeles Division. These individuals make daily visits to each of the warehouses in the Division. They include a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager and a storage manager. Each of these individuals performs his duties in his respective field for the entire East Los Angeles Division. Together they are responsible for the success of the entire East Los Angeles Division and are responsible for the success of the operations of the Division as a whole. No one is responsible only for the success of Alameda or any one of [29] the other warehouses in the East Los Angeles Division.

"(18) Defendant's East Los Angeles Division maintains moving van equipment at each of the five warehouses in the Division but all of the dispatching of all of them on all moving orders is handled by the dispatching office at the Figueroa main office of the Division, either by personal orders or by telephone orders.

"(19) All of the sales activities of defendant are conducted from the Figueroa warehouse. Defendant has an active sales program which includes 7 salesmen for the East Los Angeles Division who are expected to and do carry on sales efforts and work in individual territories within the territory of the Division which are assigned to them. The territories assigned to the respective salesmen are assigned without relation to the location of the warehouses of the Division but the territories are assigned on the basis of approximately equal sales potential in each such territory.

"(20) Eighty per cent of the customers of the East Los Angeles Division who deal with it either in person or by telephone do so at or to its Figueroa office. Defendant runs newspaper advertisements advertising its services in which the only phone number of the East Los Angeles Division listed is the telephone number at Figueroa.

"(21) The working force at the East Los Angeles Division is largely interchangeable among the various operating tasks: Most of the drivers are competent as packers and craters and most of the packers and craters are competent as drivers or helpers on moving jobs. These employees are frequently shifted back and forth from one ware-

house to another within the East Los Angeles Division; for example, one or more employees are shifted to Alameda on an average of one day per week and one or more employees are shifted from Alameda to another warehouse in the East [30] Los Angeles Division on an average of two days per week.

"(22) The accounting records for defendant's East Los Angeles Division are maintained at the Figueroa office as a single system of accounts and records. The East Los Angeles Division accounting system is the same as that used by defendant for its other districts. If defendant maintained a separate system of accouunting records for each warehouse within the East Los Angeles Division, the cost would be more than 100% greater than at present if the system were maintained at each warehouse, and more than 50% greater if the separate records were all maintained at the Figueroa warehouse. No separate accounting records are maintained for the individual warehouses in the East Los Angeles Division because of this greatly increased cost of doing so and because the management has no requirement or need for separate accounting information for each warehouse within the East Los Angeles Division.

"(23) The accounting office of the East Los Angeles Division prepares periodic financial statements including profit and loss statements and balance sheets for the Division as a whole and these are not broken down or classified in any manner for the respective warehouses located within the East Los Angeles Division, including Alameda. No financial statement or profit and

loss statements are separately prepared or maintained by defendant for Alameda.

"(24) A single set of bank accounts is maintained by defendant for the entire East Los Angeles Division, and all financial transactions, without segregation for the entire Division are handled through said bank accounts. No bank accounts are maintained separately for Alameda. Payroll records are not handled separately for Alameda but are maintained at the Figueroa office as a part of the payroll records for the entire Division.

"(25) Defendant purchases in large lots, the following supplies, which after their purchase are stored in one or another of its warehouses until needed, for use of all of its warehouses in the Los Angeles metropolitan area; naphthalen flakes, kraft paper, and towels. All other supplies for the East Los Angeles Division are purchased by the Division in large lots for the use of the entire Division, including the following: boxes, barrels, shredded paper, paper pads, corrugated paper, tissue paper, small tools, office supplies, office furniture and fixtures, business machines, and typewriters. No supplies or materials are purchased by defendant separately for the needs or requirements of Alameda alone. The East Los Angeles Division operates a repair and maintenance shop at Figueroa for all of the automotive equipment which it operates from all warehouses in the Division, and maintains there a single inventory of automotive parts and supplies for the use of the shop.

"(26) It would not be practical, economic or good business practice for defendant to divide its

East Los Angeles Division into smaller management, administrative or operating units because (a) the cost of doing so would be much greater than the present costs, (b) the present single administration, management and operation permit much greater flexibility which is required for the kind of business done by the East Los Angeles Division, and (c) the type of work being handled by defendant requires the present method of management, administration and operation.

"(27) All of the employees of defendant working at Alameda are members of a single Local (No. 389) of the International Brotherhood of Teamsters Union, which local includes, without segregation, all of the union employees of the defendant working for its East Los Angeles Division and other divisions in the Los Angeles metropolitan area. A single labor union contract uniformly applies to all of the employees of defendant in [32] its warehouses in the Los Angeles metropolitan area including the East Los Angeles Division. The union contract applicable to all the employees of the East Los Angeles Division provides that the normal work week is 48 hours in 6 days, Monday through Saturday, and provides for no payment of overtime during such work week but does provide for overtime for work in excess of 8 hours in any one day. The contract provides that in the event of any change in this work week, the contract shall be considered open for negotiations regarding wages and hours. The International Brotherhood of Teamsters Union is one of the most powerful unions in the United States. Its representatives are familiar with and keep in close touch with the business and operat-

ing problems of the employers of its members including defendant.

"(28) If defendant were forced to pay overtime to operating employees at its Alameda warehouse for work between 40 and 48 hours per week, this would upset prevailing wage patterns of defendant and create wage inequities between groups of its employees, which, in turn, would have a very serious adverse effect upon the relations of defendant with its employees and upon their morale.

"(29) Defendant handles a substantially greater volume of business at its East Los Angeles Division on Saturdays than on any other day in the week and this is a convenience to the public. If defendant were required to pay overtime for work in excess of 40 hours per week and less than 48 hours in such week, defendant would have to increase its rates and the volume of its business on Saturdays would be substantially decreased. The public has an alternative to the use of defendant's services for the moving of household goods, through the use of trailers and rental trucks. Defendant would not be able to close its Alameda warehouse after its employees there had worked in excess of 40 [33] hours in one work week because the defendant's contract with the International Brotherhood of Teamsters Union provides for a normal work week of 48 hours, Monday through Saturday, and provides for re-opening the contract in the event of a change.

"From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

"(1) The Court concludes in all respects as set forth in the foregoing Findings of Fact and any Conclusion of Law that is contained therein is hereby expressly incorporated in these Conclusions of Law with the same force and effect as though expressly set forth therein.

"(2) Defendant's East Los Angeles Division is a single establishment within the meaning of section 13 (a) (2) of the Fair Labor Standards Act (29 U. S. C., sec. 213 (a) (2) and its Alameda warehouse is not alone a single establishment within the meaning of said section.

"(3) All of the employees of defendant at its Alameda warehouse are employed by a retail or service establishment as defined in section 13 (a) (2) of the Fair Labor Standards Act (29 U. S. C., sec. 213 (a) (2) and therefore are exempt from the requirements of sections 6 and 7 of said Act (29 U. S. C., sec. 206 and 207)."

United States Court of Appeals for the Ninth Circuit

No. 14618

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

vs.

BEKINS VAN & STORAGE COMPANY, A CORPORATION, APPELLEE

Judgment

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment filed and entered: March 1, 1956.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX B

The Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201), provides in pertinent part:

SEC. 7. [63 Stat. 912–913]:

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 13 [63 Stat. 917]:

(a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the

State in which the establishment is located: *Provided,* That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business; or (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *

* * * * *

SEC. 16. [63 Stat. 920]:

* * * * *

(c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

APPENDIX C

EXTRACT FROM INTERPRETATIVE BULLETIN NO. 6, DECEMBER 7, 1938 (1940 Wage-Hour Manual, p. 154 at 157):

> 18. The question has been raised as to the scope of the term "establishment" in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. In the ordinary case, each physically separated unit or branch store will be considered a separate "establishment" within the meaning of the exemption.

Though the bulletin has been revised and reissued on several occasions, the Administrator has consistently adhered to the original interpretation of the term "establishment." The latest interpretation (15 F. R. 7245, Pt. 779.3 (b) (October, 1950) 29 CFR 1955 Supp., Sec. 779.3 (b)) reads as follows:

> SECTION 779.3.—THE "ESTABLISHMENT" BASIS FOR EXEMPTION UNDER SECTION 13 (a) (2), (3), and (4):
>
> * * * * *
>
> (b) *"Establishment" defined and distinguished.*
>
> The term "establishment" as used in section 13 (a) (2), (3), and (4) means a distinct physical place of business. The term is not synonymous with the words "busi-

ness" or "enterprise" as applied to multi-unit companies. Such business organizations operate a number of establishments, some of which may qualify for exemption and some of which may not. For example, a manufacturing company which operates several places of business for the sale of its manufactured products operates a number of separate and different types of establishments within the meaning of the exemptions. Each physically separate place of business must be considered as a separate establishment. Thus, in the case of chain-store systems, branch stores, groups of independent stores organized to carry on business in a manner similar to chain-store systems, and retail outlets operated by manufacturing or distributing concerns, each physically separated unit or branch store will, in the ordinary case, be considered a separate establishment within the meaning of the exemptions.

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IN THE

Supreme Court of the United States

October Term, 1955
No. 986

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Petitioner,

vs.

BEKINS VAN & STORAGE COMPANY, a corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court is not officially reported. The Findings of Fact and Conclusions of Law and the oral opinion of the District Court appear in the Transcript of Record, pages 33-49, 139-147. The decision of the Court of Appeals for the Ninth Circuit is reported at 231 F. 2d 25.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 1, 1956. The jurisdiction of this Court has been invoked by the Petitioner under Title 28 U. S. C. 1254(1).

Statute Involved.

The provision particularly involved in this case is Section 13(a)(2) of the Fair Labor Standards Act, as amended (c. 676, 52 Stat. 1060, 1067 (1938), as amended c. 736, 63 Stat. 910, 917 (1949), (29 U. S. C. §§201, 213(a)(2)) which reads as follows:

> "The provisions of sections 6 and 7 shall not apply with respect to . . . any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both is not for resale and is recognized as retail sales or services in the particular industry. . . ."

Question Presented.

Is the smallest management, operating and business unit of a moving and storage company a single establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act, as amended, even though parts of its activities are conducted in geographically separate buildings?

Statement.

Respondent is engaged principally in the business of moving and storing of household goods within the State of California. It is also engaged in the moving of used office equipment and furniture, the moving of stores and commercial operations, rug cleaning, fur storage, and rental of office and building space. Its principal place of business is located in Los Angeles, California [Transcript of Record, 35, 60].

Respondent's business consists of 19 divisions all located within the State of California. The division is the basic organizational unit of the Company. It is the smallest unit which has functional identity. Each division contains one or more warehouse buildings where goods are packed, stored and handled. There is a total of 36 such buildings. Many divisions have only one building; others have more than one [Tr. 35, 37].

One of the divisions in the Southern California area is the East Los Angeles Division. This Division consists principally of five warehouse buildings including the division office located in one of them [Tr. 37].

Petitioner contends that one of such buildings, the Alameda building, is a separate establishment and as such fails to meet the test of exemption as a retail or service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act, as amended. Respondent contends that the division, rather than just a physically separated building which is a part of the division, is the establishment within the meaning of Section 13(a)(2). If the division, not the building, is the establishment, Petitioner concedes that it meets the tests for exemption. If the building is the establishment it does not meet such tests.

The business of Respondent was commenced in 1895 in Los Angeles. Since that time it has grown and expanded, principally with respect to the moving and storage of household goods. Because of expansion and growth, it has been necessary from time to time for it to acquire new warehouse space, or warehouse additions. This space for historical reasons was provided in separate buildings. However, the Company could carry on its operations within the East Los Angeles Division as well or better

if all of its business were carried on in a single large building instead of in five buildings geographically separated [Tr. 42, 92, 94-95, 138].

The smallest units which can best provide an efficient local organization with full responsibility for all phases of the service provided, are the 19 divisions into which the business has been and is divided. In the Los Angeles area, the divisions are as follows: Hollywood, Beverly Hills, Compton-Lynwood, Glendale, Wilmington, Inglewood, Long Beach, San Fernando Valley, Pasadena, Santa Ana, and Santa Monica [Tr. 36].

Originally Respondent's operations in the Los Angeles metropolitan area were organized with a West Los Angeles Division and an East Los Angeles Division. The West Los Angeles Division included Hollywood, West Hollywood, Beverly Hills and Santa Monica, and the East Los Angeles Division consisted of the present geographical area. Prior to 1946, following Respondent's policy of decentralization in so far as practicable, the West Los Angeles Division was divided into the Hollywood, Beverly Hills, and Santa Monica divisions. In 1946 and again in 1950, the Company gave thorough consideration to dividing the East Los Angeles Division into smaller units but on each occasion decided that it was not practical nor feasible to do so [Tr. 37].

Each division has a division manager in charge who is responsible for all operations within the particular division. No management functions are performed separately for any one building [Tr. 36].

Each of the buildings within the East Los Angeles Division contains warehouse space, loading docks, packing equipment and yard area for the servicing and operation of moving vans. The Division is responsible for

providing moving and storage and other services throughout its territory. The territory is not further subdivided or broken down as to services to be rendered by any particular building [Tr. 38].

The division office is located in one building of the East Los Angeles Division located on Figueroa Street in Los Angeles. The Alameda building is approximately 1¾ miles from Figueroa and the other four are from 1.8 to 3.5 miles from Figueroa [Tr. 38].

Of the employees working within the Division, there are 11 who work in the Alameda building. Of such 11 employees, one is a warehouse foreman who performs manual work [Tr. 40] but who is exempt under the Act, two are working foremen, and two are office workers who receive overtime compensation equal to that required by the Act [Tr. 39]. The remaining six are warehousemen. Except for such employees and those in the other buildings, all employees, including management, supervision, sales, dispatch, office, *et cetera,* are located at the Division office.

All of the management, executive and administrative functions of the Division are performed by individuals whose principal office and location is at the Division office and who give direct orders to and supervise the employees at all five buildings in the East Los Angeles Division. These individuals make daily visits to each of the buildings in the Division. They include a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager and a storage manager. Each of these individuals performs his duties in his respective field for the entire East Los Angeles Division. Together they are responsible for the success of the operations of the Division as a whole. No one is responsible only for

the success of the Alameda building or any one of the other buildings in the Division [Tr. 42-43].

The only identity which the Alameda building has as distinguished from the East Los Angeles Division is that it is geographically separated from the office of the Division and from the other buildings utilized by the Division.

The Alameda building is an integral part of the Division as shown by the following additional facts:

(1) Substantially the same function of packing, storing and moving goods of various kinds, both commercial and household, is performed in each of the five buildings [Tr. 35, 38].

(2) The highest level of supervision at Alameda is that of foreman, a position which involves manual work. All other supervision is provided by the Division [Tr. 40, 42-43].

(3) All dispatching and orders are handled from the Division office [Tr. 43].

(4) Sales activities are conducted on a division basis, and sales territory is allocated without regard to location of individual buildings. Almost all contact with customers is handled by the Division [Tr. 43-44].

(5) The working force in the Division is interchangeable; employees are frequently and regularly shifted between buildings [Tr. 44].

(6) Records for operations in all buildings, including payroll records, are kept only at the Division office. A single system of accounts and records for operations at all buildings is maintained for the entire Division at the Division office with no separate accounts at or for the individual buildings. No separate financial statements

are made for each building; all are on a division basis. Only one bank account is maintained for the entire Division [Tr. 40, 44-45].

(7) All supplies used by the various buildings are purchased either on a company-wide or division-wide basis [Tr. 45-46].

(8) Repair and maintenance of automobile equipment is handled only on a division-wide basis [Tr. 46].

(9) All employees of the Division involved in this litigation are represented by a single local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of North America; one collective bargaining agreement applies uniformly to all [Tr. 46-47].

It would not be practical, economic or good business practice for Respondent to divide its East Los Angeles Division into smaller management, administrative or operating units because (a) the cost of doing so would be much greater than the present costs, (b) the present single administration, management and operation permit much greater flexibility which is required for the kind of business done by the East Los Angeles Division as a whole, and (c) the type of work being handled by Respondent requires the present method of management, administration and operation [Tr. 46, 131-132].

Developments Subsequent to Decision Below.

In connection with this statement of facts, Respondent desires to point out certain developments which have taken place subsequent to the decision of the Ninth Circuit Court in this matter.

On April 1, 1956 the collective bargaining agreement between the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of North America and the van and storage industry in the Southern California area, to which Respondent was a party, expired. The expired contract did not provide for overtime compensation on Saturdays. Following negotiations a new agreement was reached with the Union which is now effective and to which Respondent is also a party. Among other things this agreement provides for the payment of time and one-half for all work performed on Saturdays as well as Sundays. The regular workweek is from Monday through Friday, inclusive. The collective bargaining agreement between the parties has in the past provided and the newly negotiated agreement continues to provide for time and one-half the straight-time hourly rate for work performed in excess of eight hours in any one day during the regular work week. The contract is for a five-year period with wages and hours fixed for three years and covers the employees involved herein.

By contractual obligation therefore, with one of the strongest unions in the country, the requirements of the Fair Labor Standards Act concerning the payment of overtime, the principal basis of this litigation, have now been met. As a result the necessary payroll records will be kept.

The foregoing recent developments are stated in order that they be known to the Court in the consideration of the case.

Summary of Argument.

Respondent urges that the Petition should be denied because:

1. To the extent that it is applicable *Phillips v. Walling* (1945), 324 U. S. 490, 89 L. Ed. 1095, upon which Petitioner primarily relies, supports Respondent's position. There is no conflict or inconsistency with this decision or with the decision of any other circuit. On the contrary the relevant cases support the decision below. No case we have been able to find supports the position of Petitioner in any significant way. The interpretation of the term "establishment" under the various unemployment compensation statutes involving similar considerations supports Respondent's position.

2. The decision below is in full accord with the law and the facts. The Alameda building is merely one of several buildings comprising the smallest business or operating unit of Respondent. All of the functions of a place of business or an operating business unit are conducted upon a division basis with the physical work involved in the handling and storing of goods being performed in the Alameda building and the other buildings comprising the Division. The division is the smallest functional unit of the Company.

Physical location alone is not a sufficient basis upon which to base the existence of an establishment. Petitioner itself has so contended in other cases. While it may be a factor, the controlling considerations involve

functional unity and customary and usual business organization, operation and practices. The purpose and application of Section 13(a)(2) requires this result particularly in the light of its legislative history.

3. The significance of the decision is largely limited to the facts in this case. Its scope and significance is defined and limited in the decision below. Furthermore the overtime requirements of the Act, the principal basis of the litigation, have been met as a result of a collective bargaining agreement with the Teamsters' Union.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI.

I.

The Decision Below Is in Full Accord With the Law and Facts. There Is No Conflict or Inconsistency Between the Decision Below and Any Decision of This Court or of Any of the Circuit Courts of Appeals.

A. The Case of Phillips v. Walling (1945), 324 U. S. 490, 89 L. Ed. 1095, to the Extent That It Is Applicable, Supports the Decision Below. There Is No Inconsistency Between the Decisions.

Petitioner principally relies upon the *Phillips* decision to show a conflict with the Ninth Circuit decision. No such conflict exists. The two cases did not pass upon the same issue. In one case—the *Phillips* case—the question was whether the entire wholesaling function of a large chain store operation was an establishment separate from the retail function or whether the whole enterprise, wholesaling and retailing combined, constituted the establishment. That is, did the existence of the retailing function cause the independent wholesaling function to be exempt under Section 13(a)(2) merely because it was operated by the same company. This Court, not surprisingly, held that under Section 13(a)(2) the wholesaling function was a separate establishment and therefore not exempt.

In the instant case the issue is whether a separate building in the Division constitutes an establishment when all administrative, executive, management, operating, record keeping, employee relations, sales, and dispatching functions and all supervision above the level of foreman,

are performed on a division, not a building, basis. The smallest unit with functional identity is the division. The question therefore is whether physical separateness alone determines the existence of an establishment.

The difference in issues involved in the two cases is at once apparent.

In the *Phillips* case, decided prior to the 1949 amendments to the Fair Labor Standards Act, the company operated a chain of 49 grocery stores in two states. Quite apart from the retail stores the company operated a distributing system consisting of the ordinary wholesaling function. This operation included an office building and warehouse where the employees involved worked. The office and warehouse served all of the 49 stores. The Court held that the employees engaged in the wholesaling operation were not exempt under Section 13(a)(2). The principal ground for the decision was that the wholesale function did not take on the characteristics of a retail function within the meaning of the Act. While the retail stores were exempt from the Act the wholesale operation was not.

The defendant in that case had to contend that the entire business operation of the company constituted the retail establishment even though a division of it was a wholesale operation. The *Phillips* case decided that the term "establishment" was not necessarily the equivalent of an entire business enterprise, but could be a separate operation or division within the business.

We do not take issue here with such a holding. It appears to us to be a logical result. But we fail to see how it assists Petitioner's position in its attempt to develop a conflict with the decision below.

We have not contended that Respondent's entire company operation is a single establishment. We have merely urged that the division, of which there are 19, rather than each single building which is only a physical part of the division, is the smallest unit of the company which can be constituted an establishment upon any reasonable basis.

The Alameda building is clearly not a place of business or an operating business unit in any ordinary or usual sense. It has no functional identity. The only function performed there is the physical one of moving and storing goods and incidental activities, the same function which is interchangeably performed in the other four buildings. Only those employees are employed there who are necessary to accomplish this work together with those who are required to directly supervise the work of such employees at the first level and who themselves engage in such work. All other functions which comprise a place of business or an operating business unit—management executive, administrative, operating, record keeping employee relations, sales, dispatching and all supervision above the level of foreman—are conducted upon a division basis.

The Alameda building is part of an integrated operation only physically removed from the management offices of the Division. The building could be a physical part of the Division office without any significant change being necessary in the organization or operation of the business.

Indeed, it was specifically found by the Trial Court that Respondent could carry on its operations in the East Los Angeles Division as well or better if all of its business in the Division were conducted in a single

large building instead of five buildings geographically separated [Tr. 42, 131-2].

Many of the Company's divisions consist of only one warehouse [Tr. 35, 37]. Petitioner fails to show any valid reason why a division with more than one warehouse should be treated differently from a division with only one warehouse.

Petitioner's case must be based entirely upon the single fact that the Alameda building is geographically separate.

If Petitioner's contention were adopted where, for example, would the line be drawn? If because of lack of warehouse space in a large central warehouse, part of the warehouse space were obtained in an immediately adjacent building directly connected by passageways with the main warehouse, or if an additional floor were added, would either then become a separate establishment? What if the building were moved across the street connected by an overhead walkway? Would it make a difference if the walkway were then removed? Certainly Congress could never have intended that the removal of so tenuous a connection should be the criterion in determining whether or not a separate establishment existed. Would the result then be different if the building were moved a block or two away? It seems very clear that physical location alone cannot be the controlling factor.

Judge Carter's comments at the trial are pertinent:

> "What constitutes an establishment will depend upon the particular facts in each case. Certainly, it cannot be determined by the application of a geographical yardstick. For example, whether a warehouse used by a retail establishment is in an adjacent building, across an alley, across a street, around

the corner or a mile or two away, is certainly not the test for determining whether the warehouse and the retail store constitute one establishment." [Tr. 142.]

"If these five warehouses were located side by side down on Figueroa Street, I don't think plaintiff would seriously contend that they were separate establishments. Or suppose four of them were located there and one of them was located out where it had a spur track, I don't think there would be any contention that they are separate establishments." [Tr. 146.]

In answering a contention that a foundry and machine shop constituted separate establishments for unemployment compensation purposes, because of differences in type of work, terms of employment, immediate supervision and union representation, the Court in *Snook v. International Harvester Co.* (Ky., 1955), 276 S. W. 2d 658, said:

"To follow their argument to its logical conclusion, each *employee* would constitute a separate establishment because he is separately employed, works under different conditions, has a different seniority, etc" (p. 661). (Emphasis by the Court.)

We believe that ordinary and customary business practices are determinative of this case. There is much authority to support this result, but none to support the contrary result.

In the *Phillips* case itself, the Court said:

"But if, as we believe, Congress used the word 'establishment' *as it is normally used in business and in government*—as meaning a distinct physical *place*

> *of business*—petitioner's enterprise is composed of 49 retail establishments and a single wholesale establishment. Since the employees in question work in the wholesale establishment, §13(a)(2) is plainly irrelevant."
>
> *Phillips v. Walling,* 89 L. Ed. at 1100.*

This quotation clearly specifies that in determining the meaning of establishment, normal and customary business practices and organization must be considered. This statement also shows that it is not the separate physical building which is the criterion but rather a distinct physical *place of business.* The statement not only refers in the same sentence to a place of business but also to the term establishment "as it is normally used in business and in government. . . ." This is the heart of Respondent's position, namely, that the realities of business practice and bona fide business organization must be considered in determining what constitutes an establishment under Section 13(a)(2), and it is confirmed in the one case most heavily relied upon by Petitioner.

Even the term "physical" in the quotation is dictum since the Court's decision was based upon a separate *function* not a separate *location.*

The *Phillips* decision did not hold that organizational structure was not a consideration. On the contrary, the decision was based upon the organizational separation of functions. Certainly that case did not determine even remotely that any geographically separate building constituted an establishment. Yet that is what Petitioner must contend. If so, a shed with a single employee must also logically be an establishment.

---

*Emphasis added throughout unless otherwise indicated.

The case which is the closest on its facts to the instant case that we have found, was decided as recently as May 8, 1956, after the decision of the Ninth Circuit Court. It is *Mitchell v. T. F. Taylor Fertilizer Works Inc.* (5th Cir. 1956), 30 Adv. Labor Cases p. 91,539 (not yet officially reported). In this case some of the employees were employed at a processing plant and others were employed at a geographically separate office. One issue was whether the plant and office constituted one establishment or separate establishments under Section 13(a)(2). The Court in finding one establishment including both plant and office employees, specifically found that the primary test was whether the plant and office were "functionally an entity" (p. 91,542). The contention urged there, as here, that geographical separateness was controlling, was rejected. The Court said:

> ". . . the suggestion that the right to an exemption depends upon such factors as whether part of the business is separated by a partition, or is conducted in an adjoining building, or in a building across the street or five blocks away, does not recomment itself as a rational distinction; furthermore, it does not appear to have been the intent of Congress" (p. 91,541).

The Court considered the legislative history of the 1949 amendment to Section 13(a)(2). It also referred to the *Phillips* case as holding that functional separation was an important factor in determining the existence of an establishment and rejected the argument that that case required mere physical separation to control the existence of an establishment.

The factual distinction between the *Phillips* case and the instant case are at once apparent.

In the first place, the wholesale function was a separate function and business operation distinct from the retail operation. It had functional unity and identity. It was specifically compared by the Court with the independent wholesaler in function and operation. The Court states that the employees involved were performing duties which were "economically, functionally and physically like those of the independent wholesaler's employees . . ." (89 L. Ed. 1101). The Court would have no occasion to refer to such factors if physical location were to be the controlling criterion.

The basis of the decision in the *Phillips* case was that there was a distinction between whole *functions,* not between buildings. The Court thus separated the wholesale function, a separate operating part of the business, from the retail function. In the instant case there is no such distinction. The integration of the Alameda building with the division is complete.

Another clear distinction from the *Phillips* case is the fact that in that case the wholesaling function was of the conventional nature, distributing goods as would be true with an independent wholesaler distributing to 49 retail stores. In this case the Alameda building performs no such wholesaling function. It does not service the other warehouses either in the East Los Angeles Division or in any of the other divisions. In the organization of the company and in its function, it is on the same level and performs the same function as do the other buildings in the Division. In no sense can it be separated from the other buildings or from the Division in the manner in which the wholesale function was separated from the retail function in the *Phillips* case.

Since the *Phillips* decision only involved the question as to whether the wholesale function was separate from the retail function for the purposes of the Act, the Court was not required to consider the relationship of one retail store to the other. For the purpose of the decision, it assumed that each was a separate business operational unit—a separate retail store or establishment. However, the case does show that each store had a manager, separate accounts, its own record of inventory and transfers of goods, and its own records of cash deposits, that each store manager prepared his own requisitions, and that each was so located as to serve distinct competitive areas so as not to supplement each other's services (*Walling v. A. H. Phillips* (D. C. Mass., 1943), 50 F. Supp. 749, 750, 751).

The opinion also shows that the wholesale function would be substantially the same whether provided by an independent wholesaler or by the wholesale operation of the same company.

In the instant case there are five geographically separate buildings merged completely in a single operating unit, all rendering the same service. Together they are the smallest unit that can be considered as a "place of business" and as a single establishment. The *Phillips* case in no way denies—indeed confirms—such a result. It is not authority for Petitioner's position here.

In the *Phillips* case the basic retailing unit was the retail store (which could consist of five buildings). The comparable basic unit in the business of Respondent is the Division.

1. THE 1949 AMENDMENTS ENACTED AFTER THE PHILLIPS DECISION CONFIRM ITS SUPPORT OF THE DECISION BELOW.

The language of Section 13(a)(2) is most relevant as applied to the facts in this case. It will be noted that the section specifically refers to "annual dollar volume," to "sales of goods or services," to "not for resale" and to the "particular industry." Put together the reference is to the annual dollar volume of sales of goods or services made by the establishment within the state in which the establishment is located.

The clear purport of this section denies any reference to geographical location alone as being a criterion in determining the application of the exemption. The reference is to an operating business unit. Not one of the references in the amended section would apply to the Alameda building. If it were determined to be an establishment, how could its annual dollar volume be determined? The Company would have to fundamentally alter its method of doing business carried on for half a century. Dollar volume sales records and all other accounting, sales and management matters are determined on the basis of the Division.

It is therefore clear that if geographical location were a controlling factor, the tests which Congress adopted would have to have been otherwise stated. The fact that they were stated as they were shows that it is not the geographical location of a particular building which is to control, but rather the existence of a place of business or an operating unit—a functional entity.

Section 13(a)(2) was amended in its entirety in 1949, subsequent to the decision in the *Phillips* case. The new

and specific tests provided by the amended section, which include the language quoted above, were not in the section as it existed when the *Phillips* case was decided.

The legislative history of the amendment to Section 13(a)(2) shows that physical location is not a controlling criterion in the application of that exemption. In the *House Manager's Statement** explaining the bill which was later enacted into law without change, the following is stated:

> "Since, however, the exemption does apply to any employee employed 'by' an exempt retail or service establishment, it is applicable to employees of an exempt retail or service establishment working in a warehouse operated by and servicing such establishment exclusively, whether or not the warehouse operation is conducted in the same building as the selling or servicing activities."
>
> House Manager's Statement, H. R. Rep. No. 1453, 81st Cong., Oct. 18, 1949; 95 Cong. Rec. 14932 (1949).

Senator Holland, the sponsor in the Senate of the amendment to Section 13(a)(2) which was later enacted into law, had the following to say concerning the interpretation of that section in the light of business realities:

> "The Congress used the terms 'retail' and 'service establishment' in their customary meaning, in their

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*This was the only report concerning the amendment considered by Congress prior to its enactment.

Petitioner quotes from a document entitled "Statement of the Majority of Senate Conferees." (Pet. 12.) This document is not a part of the legislative history of the 1949 amendments. It represents the views of three senators only and was not before the Senate during the debates or before the amendments were passed by the Senate (95 Cong. Rec. 14870-2).

customary application, as they were customarily understood in the various industries of the Nation."

95 Cong. Rec. 12502 (1949).

Concerning the meaning of a retail sale or service, Senator Holland stated:

"The question is what constitutes a retail sale and what constitutes service, and in each case that is not defined in the act, but instead is defined variably in various industries by determining what are the habits and practices in the industry.

"There could be various criteria which could be applied, one of which of course would be the conclusion of the trade association in the particular industry. But that is only one criterion. Others would apply. The well-settled habits of business must be applied. They will not necessarily be the same in all trades or businesses."

95 Cong. Rec. 12510 (1949).

In the cases which are discussed below, there has been a consideration of business practices in determining the meaning of the term "establishment." In no case has physical location alone been found sufficient to justify a finding that a separate establishment exists.

2. Petitioner Itself, in Other Cases, Has Taken the Position First, That Geographical Considerations Are Not Controlling, and Second, That Business Usage and Practice Must Be Considered.

Petitioner itself has conceded, indeed urged, in actions under the Fair Labor Standards Act, that a separate physical location should not determine the existence of a separate establishment.

In *Tobin v. Aibel* (D. C., N. Y., 1952), 112 F. Supp. 156, *aff'd sub nom Durkin v. Aibel* (2d Cir., 1953), 204 F. 2d 376, Petitioner sought an injunction against the defendant restraining the use of home workers. Petitioner urged that geographically separate locations together constituted one establishment and that each separate location did not constitute a separate establishment. In adopting Petitioner's view and in granting injunctive relief, the Court said:

> "Some minor disputes are lately resolved. In the first place the defendants argue that the maintenance by them of a separate physical establishment (at East 109th Street) is of great significance. I think it is not. It must be manifest that the purposes of the act are not so easily frustrated, as in fact they would be if the act and the regulations for the particular industry were inapplicable when the operations are conducted in two physically separate premises." (P. 158.)

And in the *Phillips* case itself Petitioner, a party in that case, advocated the position which was accepted by the Court, that business usage and practice should be considered. As stated in the summary of argument preceding the case report, Petitioner argued:

> "*Under common business and governmental usage* each unit of a chain store system is a separate 'establishment' and a chain store warehouse is not a 'retail establishment.'"
>
> * * * * * * * *
>
> "The Policy of the act as a whole strongly supports the accepted governmental and business meaning of the words."
>
> *Phillips v. Walling,* 89 L. Ed. at 1096, 1097.

That position taken in the very case upon which Petitioner principally relies here, should be contrasted with the position taken in this case where Petitioner argues directly to the contrary.

Even the Administrator's Interpretative Bulletin does not establish physical separateness as the controlling factor, but rather refers to a "distinct physical place of business" stating that this is not synonymous with "business" or "enterprise" (15 F. R. 7246, Pt. 779.3(b) (October, 1950), 29 C. F. R. 1955 Supp., Sec. 779.3(b)).

Petitioner states that the decision below narrowly construes the exemption. On the contrary, it merely interprets the exemption in the only realistic and practical way, in the manner Congress intended and in accordance with Petitioner's argument in the *Phillips* case.

There is thus no conflict between the decision below and *Phillips*. On the contrary, the *Phillips* case is authority for the position of Respondent first, that the place of business and not just a geographically separated building is the criterion, and second, that as contended by Petitioner in that case, common business and governmental usage and meaning must be considered in determining what is meant by "establishment." Under either criteria, the Division and not the Alameda building is the establishment.

B. There Is No Conflict Between the Decision Below and That of Any Other Circuit.

The conflict which Petitioner alleges to exist between the decision below and decisions of other circuits, does not exist.

Petitioner seems to base its principal argument that a conflict exists, upon a contention which involves employees who are not now and never have been involved in this litigation, namely the division office employees.* Petitioner states "In so far as the decision below includes central office employees within the exemption it is in direct conflict, both factually and in legal principle, with the *Phillips*" and other decisions (Pet. p. 16). But petitioner has conceded that the division office employees are exempt whether the Alameda building or the Division constitutes the establishment [Tr. 34, 125-126]. No contention has been made that these employees are not exempt. The fact therefore that Petitioner must relate his alleged conflict to these employees rather than those involved here is significant.

If the employees which are the subject of this case, namely those who from time to time may work in the Alameda building, are considered, the lack of any conflict becomes very apparent. No decision of a circuit is in conflict with the decision below. On the contrary every

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*In its petition, Petitioner refers to the division office employees as "central office employees" borrowing the language of the *Phillips* case. The division office employees are not "central" in the sense of the *Phillips* case. There are division office employees at each of the 19 divisions, many of which consist of only one warehouse.

circuit case which has considered this question supports the instant decision.

Particularly significant is the decision in *Mitchell v. Taylor Fertilizer Works, Inc.* (5th Cir., 1956), 30 Adv. Labor Cases, p. 91,539, decided after the decision below. This decision, discussed above, is *a fortiori* in support of the instant decision. It specifically holds that functional identity is controlling and that geographical separation is not.

Other cases similarly support this result. They are however more akin to the *Phillips* case situation than that involved here.

Thus, in *Bogash v. Baltimore Cigarette Services* (4th Cir., 1951), 193 F. 2d 291, the business of the defendant was the installation and maintenance of cigarette vending machines. The defendant maintained an office and a warehouse which was used to repair and store machines not in actual use. It was contended by plaintiffs that the office and warehouse were not part of a retail establishment but rather constituted a wholesale establishment whose employees therefore did not come within the exemption of 13(a)(2).

In finding that the *Phillips* decision did not apply and that the office and warehouse did not constitute a separate establishment, the Court said:

> ". . . There is substance in the ruling that chain store systems combine wholesale as well as retail elements into a single system which must be separated in order that the affirmative provisions as well as the exemptions of the statute may be given effect. *But this procedure may not be carried so far by the courts as to divide a genuinely retail business into separate parts,* so as to hold that the exemptions

apply only to those employees who perform the act of selling. All employees employed by a retail establishment as defined in the statute are covered by the exemption."

Bogash v. Baltimore Cigarette Service, 193 F. 2d 291, 294.

This case was cited with approval in *Mitchell v. Taylor Fertilizer Works Inc.* (5th Cir., 1956), 30 Adv. Labor Cases, pp. 91,539, 91,541.

Again in *Montgomery Ward & Co. v. Antis* (6th Cir., 1947), 158 F. 2d 948, *cert. denied,* 331 U. S. 811, 91 L. Ed. 1831, the Court said:

". . . the Phillips decision does not lay down the doctrine that all employees in a building operated as a warehouse are, by reason of that fact alone, within the coverage of the Act." (P. 951.)

The facts in *Burhans v. Montgomery Ward & Co.* (S. D. N. Y., 1952), 110 F. Supp. 184, are similar to those involved in the instant case except that here the warehouse does not even service another part of the Company's business as was true in that case.

The Court considered the *Phillips* case and its applicability to the facts before it. It held that the *Phillips* case was not controlling stating that "The warehouse in the case at bar does not in any important particular fit the description of the warehouse in the *Phillips Co.* case." (110 F. Supp. 195.) The Court also stated:

"Judge Soper did not consider a physical connection between the warehouse and the retail store essential to an application of the exemption provisions of §13(a)(2) of the Act. A similar ruling had been made in Duncan v. Montgomery Ward & Co., D. C., 42 F. Supp. 879. Any other interpretation would re-

sult in conferring on a large retail store, that was so fortunate as to have an adjacent building as its warehouse, an unfair economic advantage over a large retail store that had its warehouse a mile away from the store itself. Interpretations of the statute that would result in any such discrimination are to be avoided."

Burhans v. Montgomery Ward & Co., 110 F. Supp 184, 196.

In *Duncan v. Montgomery Ward & Co.* (S. D. Tex., 1941), 42 F. Supp. 879, the company operated a retail store business in Houston, Texas. Because of limitations of space in the downtown business area, high rents and the absence of a railroad spur, the company found it necessary for reasons of economy and efficient business operation, to have warehouse space located elsewhere for the storage, handling and stocking of its merchandise. The Court found that the retail store, including the warehouse, constituted a single establishment.

The foregoing cases are *a fortiori* for Respondent's position here since they involve situations where the warehouses were engaged in the wholesaling function of supplying and servicing the retailing part of the establishment. The Alameda building does not service the other buildings in the division or store goods for such buildings. It is the division which services its entire area; there is no breakdown according to buildings and no designation of areas covered by each. All buildings and all employees, who constantly move from one building to another, operate on a division basis.

The cases cited by Petitioner do not support its position nor are they in conflict or even inconsistent with the decision of the Court below. Most of the cases involve

the same type of situation with which the *Phillips* case dealt; each cited the *Phillips* case as the basis of decision. Each involved situations where there was functional separation; in none did geographical separateness alone control. Most were also decided prior to the 1949 amendments. One was decided before the *Phillips* case decision and reached the same result. Others, in addition, placed emphasis upon the manufacturing or production, as distinguished from the distribution or retail, function.

Walling v. American Stores Co. (3d Cir., 1943), 133 F. 2d 840, was decided prior to the *Phillips* decision. The Court stated the question before it as follows:

> "The question is whether the sum total of the activity of the American Stores Company constitutes a 'retail establishment' so as to exempt the entire enterprise from the mandate of the statute." (P. 841.)

This case involved eleven warehouses in five states, seven bakeries, two canneries and numerous other businesses, as well as some 2,300 stores. The Court, not surprisingly, reached the same result as was reached in the *Phillips* case, namely, that the entire operation did not constitute a single establishment but that an operational division or function could constitute an establishment.

In *Walling v. Goldblatt Bros.* (7th Cir., 1945), 152 F. 2d 475, *cert. denied,* 328 U. S. 854, 90 L. Ed. 1627, the warehouses again performed a wholesale function, serving a chain store system operating fourteen department stores, a drug store and bakery, and the central offices of the system. *Phillips* was quoted extensively and was the basis of the decision. It should also be noted that the State Street warehouse which principally serviced one of the retail outlets and was located in proximity to it, was held exempt under Section 13(a)(2).

Four more of the cases cited by Petitioner* involved *Phillips* situations. In each there was functional separation. The warehouses performed a wholesale function servicing various retail outlets. In each the court ruled that the wholesale function was not a part of the retail function and constituted a separate establishment. As stated above we have no occasion to quarrel with this result.

Mitchell v. E. G. Shriner & Co. (7th Cir., 1955), 221 F. 2d 260, involved a company operating 33 retail markets in four states, the Court holding that the central office employees servicing these stores were "engaged in commerce" and that such employees were not exempt as employees of a retail establishment.

Fred Wolferman, Inc. v. Gustafson (8th Cir., 1948), 169 F. 2d 759, is inapplicable for the further reason that considerable emphasis was placed upon the producing or manufacturing type of activity involved as distinguished from the distribution or retail function. The employees were employed by a candy kitchen manufacturing candies and salad dressing which were supplied to several retail stores. The Court held that they were not exempt under Section 13(a)(2).

A review of the foregoing cases will show that they clearly fall into the *Phillips* category. In addition, some of them involve a producing or manufacturing function which is outside of Section 13(a)(2). They no more

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**McComb v. W. E. Wright Co.* (6th Cir. 1948), 168 F. 2d 40, *cert. denied*, 335 U. S. 854, 93 L. Ed. 402.

McComb v. Wyandotte Furniture Co. (8th Cir. 1948), 169 F. 2d 766.

Fletcher v. Grinnell Bros. (6th Cir. 1945), 150 F. 2d 337.

Armstrong Co. v. Walling (1st Cir. 1947), 161 F. 2d 515.

require the finding urged by Petitioner than does the *Phillips* case; indeed in several of the situations even less. None of these cases stand for the proposition that the Alameda building, separate from the others, constitutes a separate establishment. The courts have grouped the warehouses and considered them together as a function. These cases would be authority for Petitioner only if there were some indication that the courts treated each building comprising the wholesale function separate from all the rest, and then only if each building was a separate business unit instead of merely part of one. None of the cases support any such result.

There is no conflict therefore between any of these decisions and the decision below.

C. The Interpretation of the Term "Establishment" Under the Various Unemployment Compensation Statutes Supports the Decision Below.

A very similar question concerning the meaning of "establishment" is presented under the various state unemployment compensation laws. While the legal question involved is, of course, different, the similarities to the issue in this case are quite clear. The analogy is sufficiently close to provide persuasive authority in support of the decision below. Generally these statutes provide that no unemployment compensation is payable to an employee if the reason for his lack of work is a labor dispute at the "establishment" where he works.

While the cases under these statutes reach different results based upon the factual situation involved and place a varying emphasis upon the factors considered, the results strongly confirm the correctness of the decision below. There is no case which we have found which warrants the holding contended for here by Petitioner. None

holds that a warehouse or other building which is merely part of a business unit or function constitutes an "establishment."

In *Spielmann v. Industrial Commission* (1940), 236 Wis. 240, 295 N. W. 1, the unemployment compensation law did not allow payment of unemployment benefits to an employee if the reason for his lack of work was a labor dispute at the "establishment" where he worked. The case involved the Nash Company which had two plants 40 miles apart. The operations of the two plants were closely integrated, each performing related functions in the manufacture of automobiles. A single manager was in charge of the two plants. The employees in question were out of work at one of the plants because of a strike at the other plant. The Court summarized its view as follows:

> "It appears from this summary that although the two plants were forty miles apart, they were just as much a single establishment for the manufacture of automobiles as they would have been had they been in two buildings adjacent to each other, or in separate parts of the same building." (P. 4.)

In *Chrysler Corporation v. Smith* (1941), 297 Mich. 438, 298 N. W. 87, a similar result was reached. In this case, a strike at the Dodge main plant caused a lack of work in nine other plants in the Detroit area within a distance of 11 miles of each other. The employees at all of the plants were represented by the same union. It was found that the Company's operations were functionally integrated and synchronized, that the operations of the various plants were controlled from the main plant, that "[t]he central accounting, engineering, export, mailing, production, purchasing, routing and service departments"

(298 N. W. 87, 89) were all located in or immediately adjacent to the main plant, although each plant had individual plant managers and engineers who supervised the immediate operations of their respective plants.

The Court held that under the circumstances all of the plants constituted one establishment.

See also *Mountain States Tel. & Tel. Co. v. Sakrison* (1950), 71 Ariz. 219, 225 P. 2d 707, and *Snook v. International Harvester Co.* (Ky., 1955), 276 S. W. 2d 658.

In *General Motors Corporation v. Mulquin* (1947), 134 Conn. 118, 55 A. 2d 732, the question involved whether two plants located eighteen miles distant from each other constituted a "factory, establishment or other premises." The Court's statements in deciding this question are most relevant:

> ". . . The solution is not to be found merely in its physical isolation from Bristol, a circumstance which, as their memorandum indicates, the commissioners deemed decisive. Geographical separation is important but is by no means controlling. *Where, as here, a manufacturing corporation carries on its business in buildings at different localities, the test is whether they are so operated as to constitute a single unit;* if so, they amount to a single factory. The application of this test requires a consideration of many factors, such as the scheme of management, supervision and production of each plant. . . ." (P. 738.)

The foregoing cases therefore all stand for the proposition akin to that enunciated in the *Phillips* case, that the term "establishment" is not necessarily the same as the entire business entity, with ultimate management or common ownership the criterion, but that separate divi-

sions or separate functions can be separate establishments. Not one of the above cases, nor indeed any case we have found, has held that a separate building comprising only part of an operating unit of the company, without any organizational or employment identity other than its location, constitutes a separate establishment.

All of the cases refer to operating, functional or employment units, or places of business. They refer to customary and usual business practices and to factors which are entirely absent in the instant case. Thus, reference is made to employment, hiring and discharge practices, union representation, record keeping practices, supervisory practices, interchange of employees, seniority, management and operating practices, functional identity, and so on. If a significant number of these practices and functions are common to a particular business unit, that fact has been persuasive in finding such unit to constitute an establishment. We have found no case which has found an establishment to exist where none or only an insignificant few of these factors are applicable. In the instant case not one applies to the Alameda building. On the other hand, substantially all apply to the East Los Angeles Division.

The Alameda building is therefore not an establishment within the meaning of Section 13(a)(2). Upon the basis of all the tests, the Division is the smallest unit of the Company which can be termed an establishment.

II.

The Significance of the Decision Is Largely Limited To the Facts in This Case.

The issue involved and the decision of the Court below are based upon facts which are peculiar to this case. Neither is of general significance or importance in connection with the administration of the Act or in determining its general applicability.

It is established in the evidence that the existence of five buildings instead of one in the East Los Angeles Division is historical. There are five buildings in the Division because of the growth and change in the nature of the Los Angeles area. Many of the other nineteen divisions have a single warehouse building and division office, a situation which is typical of warehousing operations in the United States [Tr. 60, 65-68, 92-93, 109, 126-132, 137-138].

Indeed, it was found that the Company could carry on its operations within the Division as well or better if all of its business were conducted in a single large building instead of five smaller ones geographically separated [Tr. 92-94]. Furthermore, it would also be less efficient and more costly to decentralize to a busines unit smaller than the division [Tr. 44-45]. The present organization has existed for half a century.

Petitioners claim that the decision below "presents a dangerous threat to the scope and objectives of the Act" (Pet. p. 18). The holding amounts to a determination that a physically separate building with no status or functional separateness or identity as a business unit, is not an establishment. The decision finds that the business unit consisting of the Division, the smallest unit of the

Company with functional identity, constitutes the establishment.

How such a holding threatens the scope and objectives of the Act is difficult to see. Certainly it is no more of a threat than a finding that a retail store constitutes an establishment. If one of those stores consisted of five buildings instead of the usual one or two, there would be no difference at all.

Petitioner contends that the decision below must be reviewed because it would permit large chain businesses to combine non-retail units with retail units and that a producing unit and a separate sales outlet could be combined (Pet. pp. 19-20). Neither contention is correct. The only question is whether customary and usual business operations, practices and procedures, together with other relevant factors including physical location, determine the existence of an establishment or whether physical location alone is controlling so that a separate building with employees led only by a foreman, constitutes an establishment.

The decision below concisely states the extent of its holding as follows:

> "The decision here is simply that it is possible for one business located in several buildings, neither contiguous nor widely scattered, to be one establishment and that the proprietor's unit of operation and control may be considered, in a case like this one, in determining which is an establishment." (231 F. 2d 25, 27.)

Furthermore:

> "Here the defendant's pattern of business with central control at one of the area warehouses existed

before the adoption of the act. No one suggests that Bekins has adjusted its business to try to get around the act." (231 F. 2d 25, 27.)

The decision states the *Phillips* case to hold that

"The impact of the act was not to be avoided by setting up of an 'integration' of wholesale and retail functions . . . If *Phillips* holds that if a business is in separate buildings, each building is necessarily an establishment then, of course, this court is wrong. It hardly seems though that *Phillips* goes that far." (231 F. 2d 25, 27.)

The decision below did not hold that physical location was not a factor to consider. The decision states: "Geography may play quite a role." (231 F. 2d 25, 27.) It merely holds that physical separateness alone does not control. If the decision were otherwise, every shed or storeroom would constitute an establishment. Indeed as the Court of Appeals of Kentucky stated, every employee would constitute a separate establishment. (*Snook v. International Harvester* (Ky., 1955), 276 S. W. 2d 658, 661.)

Petitioner talks of the problems it may have resulting from the decision which "reopens a far-reaching problem which . . . was finally settled by *Phillips*" (Pet. p. 15). The problem settled by *Phillips* has not at all been reopened. The issue is wholly different. Furthermore, we doubt that Petitioner has considered the problems that would confront business if it suddenly were faced with the problem of having to keep separate records and documents entirely unrelated to those required for any business reason—perhaps for each shed with an employee or two (here there are eleven employees). This would result in an artificial and expensive division of a business which would accomplish no logical or reasonable purpose.

In this connection Petitioner concedes that all of the other eighteen divisions of Respondent and four of the five warehouses in the East Los Angeles Division are exempt. If Petitioner's position were sustained, one building out of Respondent's entire operation would not be exempt; all of the other buildings (including 35 warehouses) and divisions (19) would be exempt.

Furthermore, the basic purpose of the Act as stated by Petitioner "to eliminate substandard conditions" (Pet. 14) is not in jeopardy here where the employees involved are represented by the Teamsters' Union, one of the most powerful unions in the United States.

In this connection the significance of the case is further reduced when it is considered that the main basis of Petitioner's action has been removed by contract with this Union under which overtime must be paid after eight straight-time hours in a regular workday (Monday through Friday) and for all work performed on Saturdays and Sundays. This agreement is for five years with wages and hours fixed for three years. Under the circumstances—a long term agreement with the Teamsters' Union providing for the contested overtime—any practical consideration requires the conclusion that there is no reasonable probability of a recurrence of the factual situation of which Petitioner complains.

Walling v. Shenandoah-Dines Mining Co. (10th Cir. 1943), 134 F. 2d 395;

NLRB v. Delaware-New Jersey Ferry Co. (3rd Cir. 1937), 90 F. 2d 520.

The decision below reaches the only logical and practical result, the only result consistent with the requirements of Section 13 (a) (2) and the legislative history

and judicial interpretation of that section, and with customary and usual business practices. Its scope and significance is limited in the opinion itself to the narrow factual situation of this case.

Conclusion.

For the foregoing reasons we urge the Court to deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in this matter.

Respectfully submitted,

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Dated: June 27, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 122

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BEKINS VAN AND STORAGE COMPANY, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY TO THE BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner respectfully submits that respondent's representation of the facts and the issues is so at variance with the Government's understanding of them, and respondent's mistaken references to legislative, administrative and judicial statements or decisions are so numerous, as to require considerable unravelling, clarification and correction in order to assure consideration of the legal issue presented by the Government's petition in its accurate factual and legal content.

In particular, respondent's claim that Congress by the 1949 Amendments intended to change entirely the

purpose and scope of the exemption "as it existed when the *Phillips* case was decided" (Br. in Opp., pp. 20–21) contradicts its attempt to minimize the general significance of the issue, and, we submit, serves to establish the need for review by this Court. For, since *Phillips* was the leading decision settling the application of the "retail establishment" exemption prior to the 1949 Amendments, the effect of those amendments upon the *Phillips* decision plainly presents "an important question of federal law which has not been, but should be, settled by this court" (Revised Rules of the Supreme Court, Rule 19 (1) (b)).

I.

Respondent's reliance upon "subsequent developments" (Br. in Opp., pp. 7–8) assumes that the result of its recently executed agreement with the union will be to bring about full or substantial compliance with the statutory requirements so far as the issues in this particular case are concerned. Not only is this factual assumption erroneous, but, even if true, respondent has misapprehended the legal effect of such belated compliance as well as the injurious effect of an unreviewed erroneous decision of general scope on the rights of employees and on the public interest in effective enforcement of the Fair Labor Standards Act.

A. Significantly, respondent refrains from asserting that its new agreement renders the case moot, evidently because it recognizes that such a claim is wholly untenable, even if it be assumed that the effect of the agreement will bring respondent into substantial compliance with the Act. *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *James V. Reuter, Inc.*, 321

U. S. 671; *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S. 945; *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427; see also *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. These decisions have settled beyond doubt that the discontinuance of violations, whether by voluntary agreement (*Helmerich & Payne*), or by completion of the work involved in the particular litigation (*Vollmer*), or by dissolution of the corporate employer (*Reuter and Joyce Agency*), does not moot the controversy.

These same decisions also establish that such subsequent developments do not diminish the need for review by this Court of issues of public interest and importance, and, in particular, of lower court decisions erroneously interpreting provisions of the Fair Labor Standards Act which have general application. The Court has repeatedly granted review and proceeded to adjudication, notwithstanding voluntary cession or abandonment of the practices sought to be enjoined by the Government, even under circumstances where the evidence of abandonment of the practices was much more convincing and reliable than that offered by respondent here.

As shown *infra*, pp. 6–9, the subsequent developments, on which respondent relies, fall far short of assuring future compliance with the Act by respondent. But of at least equal importance is the plainly undiminished need for review in the interest of effective administration and enforcement of the Act

generally. As this Court has repeatedly recognized from the inception of this Act, its effective administration and enforcement is peculiarly dependent upon authoritative judicial determination. For this Act, unlike many other federal regulatory statutes (such as "the Interstate Commerce Act and the National Labor Relations Act and other legislation") does not provide "a preliminary administrative process for determining whether the particular situation is within the regulated area," but "puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations" (*Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 523). It is therefore only through adjudication of particular controversies that the statute's applicability can be settled and its requirements made effective.

With proper enforcement of the Act so dependent upon judicial settlement of disputed issues, the general principles established more than half a century ago in *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, *supra,* and repeatedly reaffirmed, apply with special force to this type of litigation. A defendant should not be permitted to use his voluntary or self-willed conduct as "an effectual means to prevent the judgment of this court," or to foreclose assertion of public rights "by the Government as a substantial trustee for the public under the act of Congress" (*United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. at 309), or to frustrate the Government's right of "pursuit to completion of the prescribed appellate procedure" (*Walling* v. *James V.*

Reuter, Inc., 321 U. S. at 676). These principles apply "in fuller measure in furtherance of the public interest * * * than if only private interests were involved" (*Id.* at 674–675), and particularly where there is a "public interest in having the legality of the practices settled" (see *United States* v. *W. T. Grant Co.,* 345 U. S. 629, at 632).

The special need for final judicial settlement of disputes over this Act's applicability has been greatly increased by the enactment, in the 1949 Amendments, of an important new remedy for the collection of unpaid wages. Section 16 (c) of the 1949 Amendments authorizes the Secretary, upon written request from any employee, to bring an action to recover the amount of his claim "*Provided,* That *this authority to sue shall not be used* by the Secretary *in any case involving an issue of law which has not been settled finally by the courts,* and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary if it does involve any issue of law not so finally settled" (63 Stat. 919, emphasis added). This provision was enacted as a substitute for the previously recognized jurisdiction of the courts to order restitution of unpaid wages in an injunction action by the Administrator under Section 17 (*Walling* v. *O'Grady,* 146 F. 2d 422 (C. A. 2); *McComb* v. *Frank Scerbo & Sons,* 177 F. 2d 137 (C. A. 2)), Section 17 being specifically amended to deprive the courts of jurisdiction to order payment of unpaid wages in an injunction action. In so conditioning this important restitution remedy, Congress evidently presupposed that general issues of law would be settled

by the courts, in advance, through injunction actions (like the instant action) by the Government under Section 17. Thus, as long as erroneous lower court decisions of general scope, rendered in Section 17 actions, are left unreviewed by this Court, employees are deprived of their most effective remedy for collecting unpaid wages due them.[1]

B. The facts of the instant case demonstrate the need for final settlement by this Court of the issue here involved, not only for the purpose of general enforcement of the Act, but also, despite respondent's contrary assertion, for adequate assurance against continued non-compliance by this particular employer.

In the first place, the issue is not limited, as respondent implies (Br. in Opp., p. 38), solely to a single building out of its 35 or more. The decision's impact extends currently to some, and potentially to many, other warehouses in this huge enterprise, because of the fast changing character of respondent's business. The Alameda warehouse itself, which is the subject of this suit, was originally located in a residential section and served largely as a storage warehouse for residents in the neighborhood. At that time, probably it, too, may have qualified for exemption as a retail establishment. But the change in its environment brought about a change in the character of its

[1] While the employee has an additional remedy, under Section 16 (b) of the Act, to institute his own suit, this remedy, as this Court has recognized, depends "on such whimsical or fortuitous circumstances" that it is plainly an inadequate method for effective enforcement of the Act (*McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 194). The enactment of Section 16 (c) evidences legislative recognition of this inadequacy.

business, so that this warehouse admittedly is no longer used exclusively or essentially for storage of household goods, but now serves the surrounding area which "consists entirely of a heavy industrial and commercial neighborhood" (Fdg. 16, R. 41). The record shows that the Figueroa warehouse, which is also included in the same Division, is rapidly developing into an "office record center" for storage of the files and records of the various companies in the downtown area adjacent to Figueroa Street, and is also being adapted for rental of storage space to "customers who need blocks of 5,000 foot space" (R. 130). The record also shows that similar non-retail functions are being conducted at the Wilshire warehouse, and that the proportion of retail household storage at the Crenshaw warehouse is declining (R. 130–131). At the present time (since the investigation which led to this action took place almost 4 years ago), in all likelihood, the Figueroa warehouse, and perhaps others of respondent's warehouses, are so extensively engaged in non-retail functions that they may no longer qualify for the exemption.

Nor is the significance of the issue with respect to this particular employer removed by the new union contract. The contract, which respondent claims will meet the statutory overtime requirements, does not afford any assurance whatsoever of compliance with the record-keeping requirements of the Act, which are obviously basic to any effective enforcement of the substantive wage-and-hour requirements. In addition, the contract apparently does not cover office employees (office employees were not included in the

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prior union contract, R. 20–30). Respondent erroneously states (Br. in Opp., p. 25) that the Government has conceded that the office employees are exempt. There has been no such concession. As pointed out in our petition (p. 16, fn. 3), no issue was raised as to the status of office employees because respondent was complying with respect to these employees at the time suit was instituted, but the decision below obviously now invites non-compliance with respect to these employees.

Moreover, the union contract clearly does not afford the effective protection against non-compliance which the statutory remedies provide. Both the Government and the employees are entitled to the shield of these more effective deterrents which Congress has deliberately provided—including stringent penalties for violation of an injunction or for willful violation after judicial determination that respondent is not exempt. Also, employees are entitled to know what their minimum rights are, as distinguished from what they must bargain for. It is obviously unfair, and contrary to the legislative intent, to compel employees to continue indefinitely to bargain over the minimum statutory requirements. Even the court below pointedly rejected respondent's contention that the union, being a strong one, should be relied upon to protect the employees' rights. As the decision below states, the employer and the union "cannot get together and set aside the positive policy of the act" (Pet. App., p. 28).

And even if it be assumed that the contract provides sufficient assurance of compliance at least for its three-year term, the facts of this case well illustrate

the inadequacy of such a limited term in the face of an outstanding unreviewed decision which approves and invites non-compliance. The time necessarily consumed in investigating and preparing a case for legal action, and in prosecuting the litigation to completion, frequently exceeds three years.[2] An employer may thus reap the benefits of non-compliance for five or six years, or more, before a final judicial determination of his responsibility under the Act can be secured. In the instant case the investigation which formed the basis for this suit was conducted in 1952 and early 1953, and, according to the usual procedure, covered respondent's operations for the preceding two years beginning January 1, 1950. Suit was filed January 27, 1954. Respondent admittedly was not in compliance with either the overtime or the record-keeping requirements of the Act during all this time and continuing throughout the pendency of the suit in both the District Court and the Court of Appeals. So far as appears, respondent is still not in compliance with the record-keeping requirements, and was not in compliance with the overtime requirements at least up to the time of the new union contract in April 1956—a period of at least 6½ years.

[2] Government enforcement procedure and litigation is necessarily a rather protracted process. Not only is there a lapse of time before violations are brought to the attention of the enforcement agency, but the time must be taken to investigate, and in most cases to negotiate for voluntary compliance. This is in addition to the time consumed in taking the necessary steps to prepare the case for legal action, and even further delay is often encountered because of the crowded condition of many court dockets and the delay necessarily incident to appellate review.

Under all these circumstances, we submit that there is a clear and present need for final settlement of the continuing controversy as to the applicability of the Act. Respondent should not be left free, in reliance upon the decision below and without the restraint of the statutory deterrents, to continue or resume at will its non-compliance. Not only is there a need for "determination of [the] question of law to serve as a guide to the public agency which may be called upon to act again in the same matter," but the possibility of future noncompliance by respondent "is very much with us and not merely within the realm of prophecy." See *Walling* v. *Haile Gold Mines,* 136 F. 2d 102, 105 (C. A. 4). An adjudication by this Court in the instant case is needed to resolve the continuing controversy between respondent and the Government, and to "obviate the need for, and the expense of, repetitious litigation in the future * * *" (*Ibid.*).

II.

Respondent's assertion that the significance of the decision below is "largely limited to the facts in this case" (Br. in Opp., p. 35) is equally untenable, as is evident from the broad grounds on which respondent seeks to defend the decision. Only by a persistent disregard of the limited purpose of the retail establishment exemption, and by ignoring the fact that recognition of its limited purpose was the controlling and fundamental ground for this Court's decision in the *Phillips* case, 324 U. S. 490, can respondent minimize the significance of the issue.

Section 13 (a) (2), said this Court, "is the offspring of a manifest desire to exclude from the scope of the Act 'business in the several States *that is of a purely local nature*' * * * Congress was interested in exempting those regularly engaged in *local retailing* activities and those employed by small *local retail establishments,* epitomized by the corner grocery, the drug store and the department store * * * Section 13 (a) (2) is a part of the Act *only* because of the fear that Section 13 (a) (1) in exempting employees regularly engaged in a 'local retailing capacity,' did not clearly exclude those employed by *local retailers who are situated near state lines and who make occasional interstate sales*" (*Phillips,* 324 U. S. at 497, emphasis added). It was "the *small local retailers,* who were the sole concern of Congress in Section 13 (a) (2)" (*Id.* at 498, emphasis added).

Obviously, the extensive multi-unit, multi-function, "divisions" into which respondent has organized its huge enterprise do not even approximate the description of "small local retailers" doing business of "a purely local nature except for occasional interstate sales" due to "location near State lines" (see 324 U. S. at 497–498). By no stretch of the imagination can the group of five large warehouses constituting the "division" at issue in this case be so characterized. Respondent's emphasis on the "division" as "the smallest functional unit of the Company" serves only to emphasize that the "functional unit" is not the type of "establishment" contemplated by the exemption. For, like the warehouse and central office in the *Phillips*

case, the "division" is undeniably engaged regularly and extensively in functions "in the very midst of the stream of interstate commerce" requiring that it "constantly deal with both incoming and outgoing interstate shipments"—functions "completely unlike those pursued by employees of the small local retailers, who were the sole concern of Congress in Section 13 (a) (2)" (324 U. S. at 497–498).

Respondent's attempt to represent the issue here as an insignificant dispute over a mere artificial, unrealistic "physical location" doctrine, based solely "upon the single fact that the Alameda building is geographically separate" (Br. in Opp. p. 14), reflects both a distortion of the facts and of the physical-separateness principle itself. The physical-separateness principle evolved out of the very real problem of applying an exemption, clearly intended for the limited purpose of exempting local retail activities, to large multi-function interstate enterprises which are plainly engaged extensively in activities other than local retailing. The problem presented by such large "hybrid" organizations was how to make the exemption available to the legitimate local retailing business without doing violence to the limited purpose of the exemption. It was this plainly realistic approach that led to the conclusion in *Phillips* that the "physically distinct" unit is "the essential key to the problem" (324 U. S. at 495–496).

It is a fact that the physically-separate units of such a chain organization are separate *functionally* to a marked degree, as well as geographically. Respond-

ent's physically-separate warehouses are no less functionally separate than the units of the typical chain organization, and it is a gross exaggeration to say that the "only identity which the Alameda building has * * * is that it is geographically separate" from the other warehouses of the division (Br. in Opp. p. 6). Each warehouse is not only located in a separate building but has its own equipment specially adapted to the type of warehousing carried on at the particular unit. The type of warehousing carried on by each differs in accordance with its location, the adaptability of its space, and the nature of its customers. Each has its own regular crew of employees and its own separate supervising foreman.[3] It is indeed the difference in the functions of the various units, which derives in large measure from their physical location, which affords a realistic basis for applying the exemption without doing violence to its limited purpose.

Neither the fact that the physically-separate unit may fail to have the degree of functional separation to operate as a completely separate business, nor the fact that it may be closely integrated with other units for purposes of more efficient and economical record-keeping and general management of the enterprise,

[3] The fact that the foreman performs some manual work does not, contrary to respondent's apparent implication (Br. in Opp. p. 6), detract from his status as a supervisor or executive. The stipulated facts and the findings of the trial court make it clear that he manages the warehousing functions of his unit (Stip. R. 13–14; Fdg. 13, R. 39–40). Respondent's attempt to minimize his supervisory control is hardly consistent with the stipulated fact that he is exempt from the Act as an "executive." See 29 CFR, 1956 Supp. 541.1 (e).

can be determinative of its status as a separate establishment. The Alameda warehouse is functionally no more integral a part of the "division" than the *Phillips* central office and warehouse was an integral part of that company's retail outlets. The *Phillips* company, like the respondent here, relied heavily on its functional and organizational integration, and argued, in almost the precise words used by respondent, that "whether or not an establishment, great or small, is a 'retail establishment' depends, *not on the physical location of its units, but on the character of its business*" and that its sales outlets, warehouses and office constituted an integrated operation "*as if all these activities were confined in one building*" (*Phillips* Supreme Court Br. pp. 11–12, emphasis added; compare Br. in Opp. pp. 13–14). Although this Court expressly recognized that the functions of the offices and warehouses were "completely meshed" and "integrated" with those of the sales outlets (324 U. S. at 494–495), it deliberately rejected *Phillips'* argument and adopted the physical-separateness test.

In practical effect, respondent's point is that an enterprise should be free to determine for itself, by its own administrative practices and organization, what constitutes the "establishment" and that the percentage tests are then to be applied to whatever segment (regardless of size, number of units, and variety of functions performed) which the company wishes to label as the "establishment." That this would allow the enterprise virtually complete freedom so to distribute its extensive non-retailing functions as to secure the exemption for the entire (or a large

part of the) enterprise, contrary to the plain purpose of the exemption, is evident from the facts of the instant case. As the record here shows, self-interest alone, which rests largely on factors wholly irrelevant to the purpose of the exemption, determines what "the smallest business or operating unit" of an enterprise is. Prior to 1938, for example, all of respondent's warehouses in the entire metropolitan area of Los Angeles were operated as a single organizational unit (R. 66). The reach of the retail establishment exemption, with its specific and limited objective, cannot depend upon such managerial choices.

III.

Respondent's argument on the effect of the 1949 Amendments (Br. in Opp., pp. 20–22) betrays the hollowness of its denial that the decision below is inconsistent with *Phillips,* for in this argument respondent openly rests its defense of the ruling below on the assumption that the basic purpose of the original exemption has been entirely changed since *Phillips.* This postulate is specifically and flatly contradicted by the legislative history of the 1949 Amendments. While the 1949 amendment to this exemption was intended to expand it to the limited extent of allowing a retail establishment more leeway in making non-retail sales without losing the exemption, the sponsors of the amendment emphatically disavowed any intent to change or expand *the basic purpose or type of establishment*—as described in *Phillips*—for which the exemption was originally designed. Rep-

resentative Lucas, who sponsored the amendment in the House, declared that it would do no more than confirm "the exemption for the various local neighborhood businesses whom it was the original purpose of the existing law to exempt" (95 Cong. Rec. 11004). Similarly, Senator Holland, who sponsored the amendment in the Senate, explained that it would have "the effect of confirming the exemption for the various local neighborhood businesses which it was the original purpose of the existing law to exempt" (95 Cong. Rec. 12502). It was likewise expressly stated in the report of the majority of the Senate Conferees that "the conference agreement exempts establishments which are *traditionally* regarded as retail" (95 Cong. Rec. 14877, emphasis added). The illlustrations repeatedly used in the discussion of the amendments were the same as those employed in the legislative explanation of the original enactment (referred to in *Phillips*), *i. e.* "the grocery stores, the hardware stores, the clothing stores", etc. (95 Cong. Rec. 11004, 12502). And to obviate any doubt of its acceptance and approval of this Court's view of the purpose of the exemption, the *Phillips* decision was specifically confirmed (see Government's Pet., pp. 12–13). Moreover, this specific approval expressly and particularly adopted the *Phillips* definition of the term "establishment" (see Pet., pp. 12–13).

The excerpt which respondent quotes from the Statement of the House Managers (Br. in Opp., p. 21), when read in the context of the immediately preceding sentences, patently contradicts the broad

inference which respondent purports to draw. The immediately preceding sentences read as follows:

> Paragraph (2) of section 13 (a) of the conference agreement does not exempt large mail-order houses which make most of their sales to out-of-State customers. *Nor does it exempt warehouses and central offices of chain-store systems.* The employees in such warehouses and central offices are *not employed "by" any single retail or service establishment* in the chain *but rather by the chain itself.* [95 Cong. Rec. 14932, emphasis added.]

The sentence quoted by respondent, as is evident from its very opening words, is simply contrasting the limited situation of a warehouse operated by and servicing "*exclusively*" a "single" exempt retail or service establishment (emphasis added). In a subsequent paragraph on the same page of the House Managers Report, the restricted intent of the word "by" is further explained—*i. e.*, to make clear that employees employed and working exclusively for a single exempt retail establishment are within the exemption "even though they may do most of their work outside the establishment," such as "bill collectors, outside repair and service men, outside salesmen, merchandise buyers, consumer survey and promotion workers and delivery men" (*Ibid.*).

The remaining quotations from Senator Holland, on which respondent relies, are unrelated to the question of what constitutes the retail "establishment." Senator Holland was addressing himself to an explanation of the phrase "recognized as retail sales or services"

for purposes of determining whether the retail establishment meets the requirement that 75 percent of its sales of goods or services "is not for resale and is recognized as retail sales or services in the particular industry." That respondent's quotations from Senator Holland do not carry the implication of expanding the meaning of the term "establishment" is evident from the Senator's answer to the explicit question: "What effect would this amendment have upon chain stores?" Senator Holland's answer was as follows:

> It leaves them in *exactly the same position as they are today.* Their warehouses and central offices would continue to be subject to the act. The individual branch stores, however, would continue to be exempt [he was obviously assuming, of course, that the stores met the specific retail and intrastate sales percentage requirements of the amended exemption]. This was the holding of the United States Supreme Court in *Phillips* v. *Walling* (324 U. S. 490), and *there is no intent in the proposed amendment to change such holding.* [95 Cong. Rec. 12505; emphasis added.]

IV.

Respondent's reliance upon decisions construing State unemployment compensation statutes reveals the extent of the departure by the decision below from the purpose of the exemption here in issue. Both the statutory policy and the context of the term "establishment" as used in the State unemployment statutes are so dissimilar from the present problem that this Court, in the *Phillips* case, did not even feel it necessary to

mention the decisions on which respondent here relies, although both the petitioner (A. H. Phillips, Inc.) and the American Retail Federation, *amicus curiae,* relied on *Chrysler Corp.* v. *Smith,* 297 Mich. 438, 298 N. W. 87, and *Spielmann* v. *Industrial Comm.,* 236 Wisc. 240, 295 N. W. 1 (cf. Br. in Opp., pp. 32–33).[4]

The term "establishment" in the unemployment compensation statutes is in the context of a disqualification of unemployment due to a labor dispute "at the establishment" (nine States) or "at the factory, establishment or other premises" (majority of the States) at which the claimants are employed. Even if it be assumed that a broad interpretation of the term "establishment" is warranted under the policy of these statutes[5] to prevent the use of unemployment funds in support of strikes or labor disputes, the reason underlying such broad interpretation is palpably inapplicable, and indeed diametrically opposed, to the limited purpose of the retail establishment exemption in the Fair Labor Standards Act. In the one case the statutory policy to disqualify unemployment due to labor disputes might well be frustrated by ignoring the practical fact that, normally, a labor dispute in one unit leads to unemployment in related units of a functionally integrated enterprise. On the other hand, the functional integration of a large multi-function enterprise, which admittedly is engaged extensively in interstate and non-retail functions, is scarcely a sound

[4] Compare brief for A. H. Phillips, Inc., pp. 7–8 and brief of American Retail Federation, p. 18.

[5] But see the strong dissenting opinion in the *Chrysler* case, 297 Mich. at 454–476.

reason for broad interpretation of an exemption designed only to exempt "small local retailers, who were the sole concern of Congress in Section 13 (a) (2)" of the Fair Labor Standards Act (324 U. S. at 498).

As this Court has repeatedly cautioned, the coverage of this Act is to be liberally construed and its exemptions strictly interpreted, regardless of decisions construing different statutes, even though the other statutes may be "similar." See *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 131; *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427. If decisions construing "similar" federal statutes are not applicable, it cannot be gainsaid that decisions construing completely dissimilar State statutes are clearly inapposite. Indeed, the Court has held, in a decision under this Act, that the same word may not mean the same thing each time it is used, even though in the same statute, but must be construed in its particular context. See *Farmers Reservoir and Irrigation Co.* v. *McComb*, 337 U. S. 755, where the word "produced" in the agriculture *exemption* was held to have a different and more limited meaning than the definition of "produced" for *coverage* purposes in Section 3 (j).

V.

Respondent's reliance on *Tobin* v. *Aibel*, 112 F. Supp. 156 (E. D. N. Y.) affirmed 204 F. 2d 376 (C. A. 2) (Br. in Opp., p. 23), which it cites in support of its contention that "petitioner itself has conceded" that physical separation is not determinative of a separate establishment (Br. in Opp., p. 23), reflects the same disregard for context and purpose. The issue in

Tobin v. *Aibel* related to the application of an administrative regulation designed to protect the Act's standards by prohibiting the use of home workers in the knitted outerwear industry. This regulation broadly defined the industry *for the purpose of including all operations* in it, regardless of the division of parts of the industry among particular employers. Thus, it covered not only "knitting" but the "further manufacturing, dyeing or other finishing" of articles of knitted outerwear which are "partially or completely manufactured in the same establishment as that where the knitting process is performed" (29 C. F. R. 617.5).

The defendants in that case (a man and his wife) were engaged in the production of hairnets which are made from a knitted fabric. They sought to avoid the regulation by dividing the work between two entities (a corporation and a partnership) and by designating a physically-separate location for the distribution and collection of the homework. The issue was whether the defendants should be allowed to evade the Administrator's regulation by this simple device. The decision to disregard the physical separation of the distribution point was thus no more than a practical realistic recognition that the establishment where the knitting and partial manufacturing were performed was the same establishment using the homeworkers, and that the separate distribution point was simply a device to evade the plain purpose of the regulation. That decision has no relevance whatsoever in determining the meaning of "establish-

ment" as used in the wholly different context of the Section 13 (a) (2) exemption.

The other decisions on which respondent relies also serve to emphasize that the decision below, by its disregard for the purpose of the exemption, has expanded the exemption to unlimited and unprecedented potentialities and that there is a need for another authoritative decision by this Court. In particular, the recent case of *Mitchell* v. *T. F. Taylor Fertilizer Works*, 233 F. 2d 284 (C. A. 5) demonstrates that "the possibilities of abuse" inherent in a loose construction of the term "establishment," which Congress foresaw and expressly undertook to forestall (see our Pet., pp. 18–20), are already in the process of being realized.

Respondent describes this as the case "which is the closest on its facts to the instant case that we have found" (Br. in Opp., p. 17). The Fifth Circuit there held that a fertilizer mixing plant located in the industrial part of Moultrie, Georgia, was simply an adjunct to a general sales office located five blocks away in the business district, and that the plant and sales office were "functionally an entity" and constituted a single exempt retail establishment under Section 13 (a) (2) and the new Section 13 (a) (4) added by the 1949 Amendments. 233 F. 2d at 286. This decision, like the decision below, rejected the "distinct physical place of business" concept in favor of the "functional" integration standard, with the result that the separate fertilizer processing plant, which, if not an ordinary

factory was certainly a substantial processing enterprise uncharacteristic of a typical retail establishment, was held exempt as an adjunct to a retail sales office. This is not only contrary to the terms of Section 13 (a) (4) which limits the processing aspects of the exemption to "processes at the retail establishment," but is directly opposed to the expressed legislative assurances that this section was not intended, and could not reasonably be construed, to exempt "manufacturing establishments, as such," "merely because such establishments have, or create, a retail outlet," and that "The section does not permit the tail to wag the dog" (95 Cong. Rec. 11216, 14942).[6]

[6] That the *Taylor* decision is an unwarranted expansion of the exemption is clear from the Statement of House Managers accompanying the Conference Report on H. R. 5856 (Rept. No. 1453, Oct. 17, 1949, 95 Cong. Rec. 14928–14935) listing among the conditions upon which the exemption depends: "Third, the goods which the exempt establishment makes or processes must be made or processed *at the establishment which sells the goods*" (emphasis added). That this was not intended to refer to a geographically-separate processing plan is evident from the specific examples cited in which the exemption might apply "despite the fact that there is a physical dividing line between the manufacturing portion of an establishment and the selling portion *such as a partition, wall*, etc. For example, a bakery will meet the test even though it bakes its bread and pastries *in a back room* and sells same in *a front room of its establishment*. This exemption will apply typically to bakery establishments which bake the breads and pastries which they sell, ice plants which manufacture the ice they sell, and ice cream parlors or candy kitchens which make their own ice cream or candy" (95 Cong. Rec. 14932, emphasis added).

While we believe the *Taylor* decision to be erroneous, no petition for certiorari has been filed in that case because the peculiar nature of the fertilizer business and the special character of Taylor's operations are not thought to be sufficiently

In any event, there is a marked contrast between the multi-unit, multi-function "divisions" of respondent's enterprise and Taylor's two-unit business consisting of a processing plant serving exclusively its *single local retail sales outlet*. It is equally plain that respondent's extensive non-retail functions, unlike Taylor's fertilizer processing, are not performed as an incident to respondent's local retail sales or services, but are of a distinctive character adapted to the needs of its *non-retail* customers, and unrelated to its retail services except for the fact that they are combined in a "hybrid" enterprise.

The other decisions upon which respondent relies afford even less support for the decision below, and indeed illustrate that the decision unduly expands the retail establishment exemption. *Burhans* v. *Montgomery Ward & Co.* 110 F. Supp. 184 (S. D. N. Y.) and *Duncan* v. *Montgomery Ward & Co.* 42 F. Supp. 879 (S. D. Tex.) (see Br. in Opp., pp. 27–28) were both cases involving a warehouse serving and identified *exclusively* with a *single* retail store. This is the limited situation to which respondent's quotation from the 1949 legislative history refers (see *supra,* pp. 16–17). Whether or not, prior to 1949, this limited extension of the exemption was inconsistent with the physical-separateness concept of the *Phillips* decision, Congress in 1949 apparently regarded the warehouse and store as separate establishments and

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representative of the general problem presented by the new Section 13 (a) (4). Also, it may be that review and reversal of the decision below in the instant case may suffice to resolve the problem which is now developing under Section 13 (a) (4).

felt it necessary, in order to preserve the exemption for employees in this limited situation, to do so on the basis that, although working *in* a separate establishment, they were "employed *by*" the single retail establishment for which their services were exclusively performed. These cases do not involve a substantial, if any, departure from the physical-separateness concept of *Phillips* or from the limited purpose of the exemption. In the other case cited by respondent (*Bogash* v. *Baltimore Cigarette Service,* 193 F. 2d 291 (C. A. 4)), the employees held exempt were engaged exclusively in servicing local retail vending machines.

Unlike these cases, respondent's enterprise is a *chain* organization engaged in both retail and non-retail functions.[7] This suffices to require application of the physically-separate unit concept for the same reason that this concept was applied in *Phillips*—in order to restrict the exemption to the local retailing businesses which were the sole concern of Congress. It is because the decision below departs completely from this basic purpose that it threatens to confuse

[7] Unlike the units in the *Burhans* and *Duncan* cases, the functions of respondent's Alameda warehouse (as respondent itself emphasizes, Br. in Opp., pp. 27, 28) are not keyed to or identified exclusively, if at all, with the functions of any other single retail unit, and unlike the *Bogash* case, the functions of Alameda are not identified exclusively with, or merely incidental to, respondent's local retail sales or services. Alameda is rather a functionally, as well as physically, independent unit of the five-unit chain comprising respondent's "division." The "division," although not co-extensive with respondent's entire enterprise, is nonetheless a quite extensive multi-unit, multi-function chain organization engaged in both retail and non-retail functions.

and unsettle the application of the Act in so wide and important an area.

CONCLUSION

For these reasons, and for those set forth in the petition, we respectfully submit that the petition should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 122

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BEKINS VAN AND STORAGE COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The findings of fact and conclusions of law (R. 34-49) and the oral opinion of the District Court (R. 139-147) are not officially reported. The opinion of the Court of Appeals is reported at 231 F. 2d 25.

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1956. The petition for a writ of certiorari was filed May 29, 1956, and was granted October 8, 1956. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are set forth in full in Appendix A, *infra*, pp. 33-34. The provision particularly involved here is Section 13(a)(2) which reads as follows:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

QUESTION PRESENTED

Whether five large physically-separate storage warehouses, including a central office which serves all five warehouses, constitute a single "retail establishment" within the meaning of the exemption provided by Section 13(a)(2) of the Fair Labor Standards Act.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime and record keeping provisions of the Act with respect to employees employed in its Alameda warehouse in the city of Los Angeles, California (R. 3-5). The warehouse in question is one of a large chain of storage ware-

houses operated by respondent, which engages in an extensive moving and storage business, with offices or agents in all principal cities (R. 35, 119). Respondent is the largest storage company in the United States, and its business includes the moving and storage of household goods, the moving of complete offices, stores and commercial and industrial operations, the storage of commercial goods, and the renting and leasing of office and building space (Fdg. 4, R. 35). In California, it owns and operates 36 warehouses, at each of which employees are regularly engaged in handling, packing, and storing goods substantial quantities of which have been, and are being, received from out-of-State points and have been, and are being handled, packed, shipped, delivered, transported, and offered for transportation to out-of-State points (Fdg. 5, R. 35). These warehouses, located in various parts of the State, are grouped into 19 divisions or districts (R. 11, 36), each with a main office patterned after respondent's general office (R. 36, 61-62). The offices for the various divisions perform all management, executive, and administrative functions for the warehouses within their jurisdiction (R. 42-43) and are responsible to respondent's general office or top management for the successful operation of such warehouses (R. 69).

1. Prior to 1938, all of respondent's warehouses in the metropolitan area of Los Angeles were operated as one organizational unit (R. 66). Since that date, respondent has set up two "divisions" in Los Angeles, designated as the "East Los Angeles Division" and the "West Los Angeles Division" (*ibid.*). The Alameda warehouse and four other physically-separate warehouses, together with a division central office (located in one of the warehouses) now comprise what is known

as respondent's East Los Angeles Division (Fdg. 10, R. 37-38). These warehouses are geographically scattered over an area of about six miles, each warehouse being from 1¾ miles to 6 miles distant from the others (Gov't. Exh. 2).[1] There is no dispute as to the substantial interstate character of the activities at all of the warehouses, nor is there any dispute that the Alameda warehouse, standing alone, engages substantially in non-retail storage in sufficient volume to disqualify it for the "retail establishment" exemption of Section 13 (a) (2) of the Act, if it is regarded as a single establishment. The parties stipulated and the District Court found that Alameda, standing alone, if it is a single "establishment" within the meaning of Section 13 (a) (2), does not meet the percentage tests prescribed in that section, *i. e.*, admittedly 50 percent or more of its annual dollar volume of sales of service is made outside the State and admittedly more than 25 percent is non-retail in character. It was also stipulated, on the other hand, that, if the "East Los Angeles Division", rather than each separate warehouse, constituted the "establishment," the Division does meet the percentage tests of the exemption (Fdg. 2, R. 34; Stip. R. 18).[2]

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[1] The original exhibits consisting of a map of the City of Los Angeles showing the location of each of these warehouses (Govt's. Exh. 2) and a group of photographs of the warehouses in the East Los Angeles Division (Govt's. Exh. 1) were transmitted to this Court by the Clerk of the Ninth Circuit.

[2] The pertinent provision of the stipulation reads as follows:

> "It is agreed and the Court may accept as established fact without further proof that the percentage tests of Section 13(a)(2) of the Fair Labor Standards Act of 1938, as amended, are satisfied if the East Los Angeles Division is a single establishment within the meaning of Section 13(a)(2), the business activities of which are considered together as a unit, but that

2. Alameda is a large five-story, reinforced concrete building containing approximately 60,000 square feet of space (Fdg. 13, R. 39). It is located approximately 1¾ miles from the warehouse which houses the "Division" office (Fdg. 10, R. 38). Unlike some of respondent's other warehouses which are located in residential areas from which they draw most of their business, the Alameda warehouse is located in the heart of the industrial area of Los Angeles on a spur track of the Southern Pacific Railroad where freight cars are regularly received and dispatched (Fdg. 15-16, R. 41, 129, 124; Stip. R. 12). In addition to the moving van equipment and loading docks which all of the warehouses have, Alameda is equipped with a railroad siding and railway loading docks to accommodate the loading and unloading of freight cars (Fdg. 13, R. 39; Fdg. 18, R. 43).

Although, when originally constructed over a half century ago (1898), the Alameda warehouse was in a residential section (R. 40, 126), the surrounding area now "consists entirely of a heavy industrial and commercial neighborhood" (Fdg. 16, R. 41). Because of the change in Alameda's environment, respondent has changed the character of the business done there to accommodate the customers in its immediate proximity (Fdg. 16, R. 42), with the result that this warehouse admittedly is no longer used essentially for storage of household goods as it once was. While the record does not disclose in detail the precise nature of Alameda's non-retail functions (the stipulation of their

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such tests are not met in the case of Alameda if Alameda alone is a single establishment within the meaning of Section 13 (a)(2), the business activities of which are considered separately as a unit." (Stip. XII, R. 18)

non-retail character made such evidence unnecessary), it appears that Alameda engages substantially in the general "storage of commercial goods" such as "phonographs and radios and washing machines, and things like that" for the business concerns located in its environs which "consist entirely of heavy industrial and commercial" enterprises (Stip. R. 18; Fdg. 16, R. 41, 129).

3. Alameda, like each of respondent's other warehouses, has its own foreman in charge of its physical operations, and its own separate crew of regular employees, although there is some interchange of employees among the several warehouses in the "Division" (Fdg. 13, R. 40; Stip. R. 13-14). The administrative management of Alameda, however, is organizationally integrated with the management of the other warehouses of the "Division." The executive, administrative, and clerical functions for the whole "Division" are performed by a central office located in one of the warehouses known as "Figueroa." The "Division" office is composed of a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager, and a storage manager who perform their respective duties for the whole "Division" (Fdg. 17, R. 42-43). In addition, the "Division" office employees keep the payrolls, handle all the accounting, do the banking, carry on an active sales program, and purchase the maintenance and operational materials and supplies (Fdgs. 19, 22-25, R. 43, 44-46).

4. The District Court held that respondent's whole East Los Angeles Division—consisting of Alameda, four other warehouses, and a central office—constitutes a single "establishment" within the meaning of the

exemption contained in Section 13 (a) (2) of the Act, and dismissed the complaint (R. 49, 50). The Court of Appeals affirmed, holding that "the proprietor's unit of operation and control may be considered * * * in determining what is an establishment." In arriving at this conclusion, the court held that this Court's decision in *Phillips, Inc.* v. *Walling,* 324 U. S. 490, did not hold that "if a business is in separate buildings, each building is necessarily an establishment," but that the rationale of *Phillips* was limited to the specific type of non-retail function there involved, *i. e.* "the warehouse function [which] historically had been that of independent wholesalers or wholesalers independent of retail grocers".

SUMMARY OF ARGUMENT

A. That the term "establishment," as used in Section 13(a)(2) of the Fair Labor Standards Act (App. A, *infra,* p. 33), means "a distinct physical place of business" and not a group of functionally integrated units of a chain organization, was settled over ten years ago by this Court's decision in *Phillips v. Walling,* 324 U.S. 490, 496. The decision below mistakenly treated this ruling as mere *obiter dictum,* overlooking the basic stress of *Phillips* upon the separate physical establishment as "the essential key" to a realistic restriction of the "retail establishment" exemption to its plainly limited purpose. The fundamental ground for the *Phillips* decision was the recognition that the only purpose of Section 13(a)(2) was to exclude from the scope of the Act "local retailing activities" and "local retailers who are situated near state lines and who make occasional interstate sales"—"the small local retailers who were the sole concern of Congress in Section

13(a)(2)" (324 U.S. at 497, 498), and that the "physically distinct" unit standard was "the essential key to the problem" of applying the exemption to large multi-function interstate chain enterprises without doing violence to this limited purpose (*Id.* at 495-496).

The attempt by the court below to distinguish *Phillips* on the ground that that decision applied only to the specific type of "wholesaler" function there involved, not only misconceives the basic rationale of *Phillips,* but is also factually untenable. The facts of the instant case, no less than those in *Phillips,* present the problem of applying the exemption to a large "multi-function," "hybrid" chain organization engaged extensively in non-retail functions "in the very midst of the stream of interstate commerce," as well as in local retailing functions (*id.* at 494, 495, 496). Not only are the admittedly non-retail functions of respondent's Alameda warehouse of the same "wholesaler" nature as the functions of the *Phillips* warehouse, but respondent's physically separate warehouses are functionally no more integral a part of the "Divisions" than the *Phillips* central office and warehouse was an integral part of that company's retail outlets. The *Phillips* central office and warehouse was held to be a separate establishment despite the express recognition that its functions were "completely meshed" and "integrated" with those of the sales outlets (*id.* at 494-495). Respondent's emphasis on the "Division" as "the smallest functional unit of the company" serves only to emphasize that the "functional unit" is not the type of "establishment" contemplated by the exemption. Obviously, the extensive multi-unit, multi-function "Division" here in issue does not even approxi-

mate "the small local retail establishments" "who were the sole concern of Congress in Section 13(a)(2)." (*Id.* at 498). The *Phillips* decision plainly rejected the notion that the reach of the "retail establishment" exemption, with its specific and limited objective, could depend upon the functional integration which a chain enterprise chooses to adopt for managerial convenience or for reasons of self-interest wholly irrelevant to the purpose of the exemption.

B. The limited purpose of the Section 13(a)(2) exemption and the meaning of the term "establishment," as construed in the *Phillips* decision and by administrative interpretation, were expressly reaffirmed by Congress at the time of the enactment of the 1949 Amendments to the Fair Labor Standards Act. While the amendment to this exemption was intended to expand it to the limited extent of allowing a retail establishment more leeway in making non-retail sales without losing the exemption, the sponsors of the amendment, in both the Senate and the House, repeatedly emphasized that the amendment did not go beyond "confirming the exemption for the various local neighborhood businesses whom it was the *original purpose* of the existing law to exempt," and would exempt only "establishments which are *traditionally regarded as retail,*" giving the same illustrations as those employed in the legislative explanation of the original enactment (referred to in *Phillips*), *i.e.* "the grocery stores, the hardware stores, the clothing stores," etc. (95 Cong. Rec. 11004, 12502, emphasis added). And to obviate any doubt of its acceptance and approval of this Court's view of the limited purpose of the exemption, the *Phillips* decision was specifically confirmed and its

definition of the term "establishment" expressly approved (95 Cong. Rec. 14877 and 12579).

In addition to the legislative history expressly approving the *Phillips* decision, the administrative interpretation in accord with that decision was legislatively reaffirmed by Section 16(c) of the 1949 Amendments, which provided that administrative interpretations not inconsistent with the amendments "shall remain in effect." See *Steiner* v. *Mitchell*, 350 U.S. 247, 255; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16-17.

C. Prior to the decision below, other Courts of Appeals consistently recognized *Phillips* as controlling. They applied the physically-separate-unit standard to a variety of chain and multi-unit organizations comparable to respondent's, and have not considered it as limited to the same kind of "wholesaler" functions involved in *Phillips*. *Armstrong Co.* v. *Walling*, 161 F.2d 515 (C.A. 1); *McComb* v. *W. E. Wright Co.*, 168 F.2d 40 (C.A. 6), certiorari denied, 335 U.S. 854; *Fletcher* v. *Grinnell Bros.*, 150 F.2d 337 (C.A. 6); *Montgomery Ward & Co.* v. *Antis*, 158 F.2d 948 (C.A. 6), certiorari denied, 331 U.S. 811; *Walling* v. *Goldblatt Bros.*, 152 F.2d 475 (C.A. 7), certiorari denied, 328 U.S. 854; *Mitchell* v. *E. G. Shinner & Co.*, 221 F.2d 260 (C.A. 7) (decided April 4, 1955, *i.e.* subsequent to 1949 Amendments); *McComb* v. *Wyandotte Furniture Co.*, 169 F.2d 766 (C.A. 8); *Fred Wolferman, Inc.* v. *Gustafson*, 169 F.2d 759 (C.A. 8). See also *Walling* v. *American Stores Co.*, 133 F.2d 840 (C.A. 3), decided prior to *Phillips*.

D. The few decisions on which respondent has relied are inapposite and serve only to confirm the error of the

ruling below by plainly revealing its misconception of the purpose and context of the exemption here in issue.

ARGUMENT

Each of Respondent's Physically-Distinct Storage Warehouses Is a Separate "Establishment" and Respondent's "Division" (Composed of Five Large Physically-Separate Warehouses) Does Not Constitute a Single "Retail Establishment," Within the Meaning of the Exemption Provided by Section 13(a)(2) of the Fair Labor Standards Act

This Court's decision, over ten years ago, in *Phillips v. Walling,* 324 U.S. 490 (March 26, 1945), settled the meaning of the term "establishment" as used in Section 13(a)(2) of the Fair Labor Standards Act. It was there held that "establishment" means "a distinct physical place of business" and not "an entire business or enterprise" of a "multi-function" chain organization. 324 U.S. at 496. This decision was expressly approved by Congress at the time of the passage of the 1949 Amendments to the Act. The decision below patently rests upon a misconception of the *Phillips* decision and of the purpose of the Section 13(a)(2) exemption.

A. *The decision below is contrary to Phillips Co. v. Walling, 324 U.S. 490, and to the limited purpose of the Section 13(a)(2) exemption.*

1. The *Phillips* decision, which is the leading one on the "retail or service establishment" exemption, held that both the terms of Section 13(a)(2) and its purpose showed that "Congress used the word 'establishment' as it is normally used in business and in government—as meaning a distinct physical place of business," and that, therefore, each of the 49 stores of the Phillips chain, as well as the separate warehouse, was a

separate establishment (324 U.S. at 496)—regardless of the degree of integration of their functions and control, and regardless of the fact that the "prime function" of the chain system as a whole was to sell at retail. Section 13(a)(2), said the Court, "is the offspring of a manifest desire to exclude from the scope of the Act 'business in the several States *that is of a purely local nature*' * * * Congress was interested in exempting those regularly engaged in *local retailing* activities and those employed by small *local retail establishments*, epitomized by the corner grocery, the drug store and the department store * * * Section 13(a)(2) is a part of the Act *only* because of the fear that Section 13(a)(1) in exempting employees regularly engaged in a 'local retailing capacity,' did not clearly exclude those employed by *local retailers who are situated near state lines and who make occasional interstate sales*" (*Phillips*, 324 U.S. at 497, emphasis added). It was "the *small local retailers*, who were the sole concern of Congress in Section 13(a)(2)" (*Id.* at 498, emphasis added).

Obviously, the extensive multi-unit, multi-function, "Divisions" into which respondent has organized its huge enterprise do not even approximate the description of "small local retailers" doing business of "a purely local nature" except for "occasional interstate sales" due to "location near State lines" (see 324 U.S. at 497-498). By no stretch of the imagination can the group of five large warehouses constituting the "Division" at issue in this case be so characterized. Respondent's emphasis on the "Division" as "the smallest functional unit of the Company" (Br. in Opp. p. 9) serves only to emphasize that the

"functional unit" is not the type of "establishment" contemplated by the exemption. For, like the warehouse and central office in the *Phillips* case, the "Division" is undeniably engaged regularly and extensively in functions "in the very midst of the stream of interstate commerce" requiring that it "constantly deal with both incoming and outgoing interstate shipments"—functions "completely unlike those pursued by employees of the small local retailers, who were the sole concern of Congress in Section 13(a)(2)" (324 U.S. at 497-498).

2. The attempt of the court below to limit *Phillips* to the specific type of non-retail function there involved —*i.e.*, a function historically performed by the "independent wholesaler or middleman"—not only misconceives the basic stress of that decision on the separate physical establishment but also fails to recognize that factually the non-retail functions performed by a commercial storage warehouse, such as respondent's Alameda unit, are in this same "wholesaler" category. Warehousing of commercial goods is known in the trade as warehousing of "general merchandise", as distinguished from "household goods and furniture." See Frederick, *Public Warehousing*, pp. 15-16. "General merchandise warehouses" are defined as those used "for *the storage of merchandise and commodities by manufacturers or other shippers until the goods are required by retailers, distributors, or industrial and household consumers.* * * * General merchandise warehouses are frequently referred to as distribution warehouses. *They really act as service links between the producer and consumer.*" *Ibid.* [Emphasis added.] Therefore, there is no factual basis for the court's assumption that the admittedly non-retail functions of respondent's

Alameda warehouse are substantially different from the "wholesaler" functions of the *Phillips* warehouse.[3]

The fact that the warehouse performs its non-retail functions for independent industrial and business concerns, rather than for its own retail outlets, clearly does not suffice to distinguish the *Phillips* case. On the contrary, independent warehouse functions would *a fortiori* be outside the scope of the exemption, as is evident from the emphasis in *Phillips* on the analogy of the independent warehousing and wholesaling function. Similarly, the fact that the non-retail functions are here combined for administrative and management purposes with the company's retail functions is no more reason for applying the exemption than there was for exempting the non-retail warehousing functions which were organizationally integrated, indeed "completely meshed," with *Phillips'* retail operations (324 U. S. at 494-495).

3. The court below was also led into error by its acceptance of respondent's representation of the Government's position as a purely technical and artificial application of a "physical location" rule, based "upon the single fact that the Alameda building is geographically separate" (see Br. in Opp., p. 14). This reflects a distortion of the facts of this case, as well as a distortion of the physical-separateness principle itself. As the *Phillips* decision makes plain, the physical-separateness principle evolved out of the very real problem of apply-

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[3] The record shows that the Alameda warehouse engages substantially in the general "storage of commercial goods" (including "phonographs and radios and washing machines, and things like that," R. 129) for business concerns located in the "heavy industrial and commercial neighborhood" in which the warehouse is located (Stip. R. 10-11; Fdg. 16, R. 41-42; see also Gov't Exh. 1, including pictures of Alameda with "commercial storage" prominently marked on the outside wall of the building).

ing an exemption, clearly intended for the limited purpose of exempting local retail activities, to large multifunction interstate enterprises which are engaged extensively in activities other than local retailing. The problem presented by such large "hybrid" organizations was how to make the exemption available to the legitimate local retailing business without doing violence to the limited purpose of the exemption. It was this realistic approach that led to the conclusion in *Phillips* that the "physically distinct" unit is "the essential key to the problem" (324 U. S. at 495-496).

It is a fact that the physically-separate units of such a chain organization are separate *functionally* to a marked degree, as well as geographically. Respondent's physically-separate warehouses are no less functionally separate than the units of the typical chain organization, and it is a gross exaggeration to say that the "only identity which the Alameda building has * * * is that it is geographically separate" from the other warehouses of the division (Br. in Opp. p. 6). Each warehouse is not only located in a separate building but has its own equipment specially adapted to the type of warehousing carried on at the particular unit. The type of warehousing carried on by each differs in accordance with its location, the adaptability of its space, and the nature of its customers. Each has its own regular crew of employees and its own separate supervising foreman.[4] It is indeed the difference in the functions

[4] The fact that the foreman performs some manual work does not, contrary to respondent's apparent implication (Br. in Opp. p. 6), detract from his status as a supervisor or executive. The stipulated facts and the findings of the trial court make it clear that he manages the warehousing functions of his unit (Stip. R. 13-14; Fdg. 13, R. 39-40). Respondent's attempt to minimize his supervisory control is hardly consistent with the stipulated fact that he is exempt from the Act as an "executive." See 29 CFR, 1956 Supp. 541.1 (e).

of the various units, which derives in large measure from their physical location, which affords a realistic basis for applying the exemption without doing violence to its limited purpose.

Neither the fact that the physically-separate unit may fail to have the degree of functional separation necessary to operate as a completely separate business, nor the fact that it may be closely integrated with other units for purposes of more efficient and economical record-keeping and general management of the enterprise, can be determinative of its status as a separate "establishment." The Alameda warehouse is functionally no more integral a part of the "Division" than the *Phillips* central office and warehouse was an integral part of that company's retail outlets. The *Phillips* company, like the respondent here, relied heavily on its functional and organizational integration, and argued, in almost the precise words used by respondent, that "whether or not an establishment, great or small, is a 'retail establishment' depends, *not on the physical location of its units, but on the character of its business*" and that its sales outlets, warehouses and office constituted an integrated operation *"as if all these activities were confined in one building"* (*Phillips* Supreme Court Br. pp. 11-12, emphasis added; compare respondent's Br. in Opp. pp. 13-14). Although this Court expressly recognized that the functions of the office and warehouse were "completely meshed" and "integrated" with those of the sales outlets (324 U. S. at 494-495), it deliberately rejected Phillips' argument and adopted the physical-separateness test.

In practical effect, the decision below would leave an enterprise free to determine for itself, by its own administrative practices and organization, what constitutes

the "establishment," with the percentage tests then to be applied to whatever segment (regardless of size, number of units, and variety of functions performed) the company wishes to label as the "establishment." That this would allow the enterprise virtually complete freedom so to distribute its extensive non-retailing functions as to secure the exemption for the entire (or a large part of the) enterprise, contrary to the plain purpose of the exemption, is evident from the facts of the instant case. As the record here shows, self-interest alone, which rests largely on factors wholly irrelevant to the purpose of the exemption, determines what "the smallest business or operating unit" of an enterprise is. Prior to 1938, for example, all of respondent's warehouses in the entire metropolitan area of Los Angeles were operated as a single organizational unit (R. 66). The reach of the retail establishment exemption, with its specific and limited objective, cannot depend upon such managerial choices.

B. *The limited purpose of the Section 13(a)(2) exemption and the meaning of the term "establishment," as construed in the Phillips decision and by administrative interpretation, were expressly reaffirmed by Congress at the time of the enactment of the 1949 Amendments to the Fair Labor Standards Act.*

Respondent, in seeking to defend the decision below, has contended that the basic purpose of the original exemption has been entirely changed, since the *Phillips* decision, by the enactment of the 1949 Amendments (Br. in Opp., pp. 20-22). This contention is specifically and flatly contradicted by the legislative history of those Amendments. While the 1949 amendment to this exemption was intended to expand it to the limited

extent of allowing a retail establishment more leeway in making non-retail sales without losing the exemption, the sponsors of the amendment emphatically disavowed any intent to change or expand *the basic purpose or type of establishment*—as described in *Phillips* —for which the exemption was originally designed. Representative Lucas, who sponsored the amendment in the House, declared that it would do no more than confirm "the exemption for the various local neighborhood businesses whom it was the original purpose of the existing law to exempt" (95 Cong. Rec. 11004). Similarly, Senator Holland, who sponsored the amendment in the Senate, explained that it would have "the effect of confirming the exemption for the various local neighborhood businesses which it was the original purpose of the existing law to exempt" (95 Cong. Rec. 12502). It was likewise expressly stated in the report of the majority of the Senate Conferees that "the conference agreement exempts establishments which are *traditionally* regarded as retail" (95 Cong. Rec. 14877, emphasis added). The illustrations repeatedly used in the discussion of the amendments were the same as those employed in the legislative explanation of the original enactment (referred to in *Phillips*), *i. e.*, "the grocery stores, the hardware stores, the clothing stores", etc. (95 Cong. Rec. 11004, 12502).

To obviate any doubt of Congress' acceptance and approval of this Court's view of the purpose of the exemption, the *Phillips* decision was specifically confirmed; and this specific approval expressly and particularly adopted the *Phillips* definition of the term "establishment." See the Statement of the majority of the Senate conferees that the *Phillips* definition of "establishment" as "a physically separate place of business" was to be retained (95 Cong. Rec. 14877):

> * * * Under the present law (*Phillips* v. *Walling* (324 U. S. 490)) *a retail establishment means a physically separate place of business which possesses the characteristics of a retailer and does not mean an entire business enterprise. The conference agreement in no way changes the meaning of the term "establishment."* [Emphasis added.] [5]

Respondent, in its Brief in Opposition (p. 21), quotes the following excerpt from the Statement of the House Managers:

> Since, however, the exemption does apply to any employee employed "by" an exempt retail or service establishment, it is applicable to employees of an exempt retail or service establishment working in a warehouse operated by and servicing such establishment exclusively, whether or not the warehouse operation is conducted in the same building as the selling or servicing activities. [H.R. Rep. No. 1453, 95 Cong. Rec. 14932.]

But this excerpt, when read in the context of the immediately preceding sentences, patently contradicts the broad inference which respondent draws. The immediately preceding sentences read as follows:

> Paragraph (2) of section 13 (a) of the conference agreement does not exempt large mail-order

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[5] Senator George, one of the sponsors of the amendment to Section 13 (a) (2), made the same point (95 Cong. Rec. 12579):

> "* * * I wish to say that the word 'establishment' has been very well defined in the Wage and Hour Act. It means now a single physically separate place of business which possesses the characteristics of a retailer and it does not mean an entire business enterprise."

See also Senator Holland's statement, quoted *infra*, p. 21.

houses which make most of their sales to out-of-State customers. *Nor does it exempt warehouses and central offices of chain-store systems.* The employees in such warehouses and central offices are *not employed "by" any single retail or service establishment* in the chain *but rather by the chain itself*. [95 Cong. Rec. 14932, emphasis added.]

The sentence quoted by respondent, as is evident from its opening words, is simply contrasting the limited situation of a warehouse operated by and servicing "*exclusively*" a "single" exempt retail or service establishment (emphasis added). In a subsequent paragraph on the same page of the House Managers Report, the restricted intent of the word "by" is further explained —*i. e.*, to make clear that employees employed and working exclusively for a single exempt retail establishment are within the exemption "even though they may do most of their work outside the establishment," such as "bill collectors, outside repair and service men, outside salesmen, merchandise buyers, consumer survey and promotion workers and delivery men" (*ibid.*).

The remaining quotations from Senator Holland, on which respondent relies, are unrelated to the question of what constitutes the retail "establishment." Senator Holland was addressing himself to an explanation of the phrase "recognized as retail sales or services" for the purpose of determining whether the retail establishment meets the requirement that 75 percent of its sales of goods or services "is not for resale and is recognized as retail sales or services in the particular industry." That respondent's quotations from Senator Holland do not carry the implication of expanding the meaning of the term "establishment" is plain from the Senator's answer to the explicit question: "What effect

would this amendment have upon chain stores?" Senator Holland's answer was as follows:

> It leaves them in *exactly the same position as they are today.* Their warehouses and central offices would continue to be subject to the act. The individual branch stores, however, would continue to be exempt [he was obviously assuming, of course, that the stores met the specific retail and intrastate sales percentage requirements of the amended exemption]. This was the holding of the United States Supreme Court in *Phillips* v. *Walling* (324 U. S. 490), and *there is no intent in the proposed amendment to change such holding.* [95 Cong. Rec. 12505; emphasis added.]

Moreover, the consistent administrative interpretation of the term "establishment" as meaning "each physically separated unit" of a chain or multi-unit organization (see App. B, *infra*, pp. 35-36) was outstanding when the 1949 Amendments were enacted. Thus, in addition to the above-quoted express approval of the *Phillips* decision adopting this administrative interpretation, this construction was legislatively reaffirmed by Section 16(c) of the 1949 Amendments (c. 736, 63 Stat. 910, 916(c)) which provided that all administrative interpretations in effect at the time and not inconsistent with the amendments "shall remain in effect." See *Steiner* v. *Mitchell*, 350 U.S. 247, 255; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16-17. Thus, even if the *Phillips* decision were reasonably susceptible to the Ninth Circuit's construction, the decision below is contrary to the now-settled meaning of the term "establishment" as used in the exemption.

C. *Prior to the decision below, other Courts of Appeals consistently recognized the Phillips decision as controlling the meaning of the word "establishment" in Section 13(a)(2).*

The *Phillips* decision has been consistently applied by other Courts of Appeals to cases involving a variety of chain and multi-unit organizations comparable to respondent's. *Armstrong Co.* v. *Walling*, 161 F. 2d 515 (C.A. 1); *McComb* v. *W. E. Wright Co.*, 168 F. 2d 40 (C.A. 6), certiorari denied, 335 U.S. 854; *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C.A. 6); *Montgomery Ward & Co.* v. *Antis*, 158 F. 2d 948 (C.A. 6), certiorari denied, 331 U. S. 811; *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475 (C.A. 7), certiorari denied, 328 U.S. 854; *Mitchell* v. *E. G. Shinner & Co.*, 221 F. 2d 260 (C.A. 7) (decided April 4, 1955, *i.e.*, subsequent to 1949 Amendments); *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C.A. 8); *Fred Wolferman, Inc.* v. *Gustafson*, 169 F. 2d 759 (C.A. 8). See also *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C.A. 3), decided prior to *Phillips*.[6]

All of these decisions, involving various types of multi-unit organizations, were predicated on the basis that each distinct place of business is a separate "establishment." Insofar as the decision below includes central office employees within the exemption,[7] it is in direct

[6] Certiorari was granted in *Phillips* because of the conflict in reasoning between the First Circuit's *Phillips* decision and the Third Circuit's decision in *Walling* v. *American Stores Co.*, 133 F. 2d 840, on the one hand, and *Walling* v. *Block*, 139 F. 2d 268, certiorari denied, 321 U. S. 788; *Walling* v. *L. Wiemann Co.*, 138 F. 2d 602 (C. A. 7), and *Allesandro* v. *C. F. Smith Co.*, 136 F. 2d 75 (C. A. 6), on the other hand (see 324 U. S. at 493, n. 1).

[7] Respondent's central office is not located in the Alameda warehouse but is located in one of the other warehouses (Figueroa)

conflict, both factually and in legal principle, with the *Phillips, Wright, Goldblatt* and *Shinner* cases, *supra,* all of which held that physically-distinct central accounting, sales, and executive offices servicing several retail outlets were not exempt, regardless of the degree of functional integration with the operations of the retail outlets. In the *Wright* case, *supra,* the Sixth Circuit held the exemption inapplicable to the central offices, although they were located on the top story of the same building in which extensive retail functions were carried on. Similarly in *Goldblatt, supra,* the Seventh Circuit held the exemption inapplicable to the central offices although they were in the same building as one of the retail stores (152 R. 2d at 478). Thus, in this respect these cases are indistinguishable factually from the present one.

Also, contrary to the decision below, other Courts of Appeals have not considered the *Phillips* principle to be limited to the same kind of "wholesaler" functions as in that case. In *Armstrong, supra,* the inapplicability of the exemption was recognized with respect to a physically-separate warehouse servicing a chain of refreshment stands in various railroad stations, and the exemption was also held inapplicable to a commissary located in one of the railroad stations but preparing food for the various refreshment stands of the chain. There too, the company contended that *Phillips* was limited to the warehouse, claiming that the commissary "was part

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included in the same "Division" held by the court below to constitute an exempt "establishment." Because the company was complying with respect to these office employees at the time suit was instituted, no issue was raised as to their status. However, the decision below, holding the entire "Division" exempt, now obviously invites noncompliance with respect to the office employees also.

of one retail establishment" composed of the stands located in the same station as the commissary. In rejecting this argument, the First Circuit pointed out that the "commissary is integrated with, but physically distinct from, the stands in the station * * * . It is a distinct place of business * * * " (161 F. 2d at 516). Similarly, in *American Stores, supra,* the exemption was held inapplicable by the Third Circuit not only to the central office and warehouse, which performed wholesale functions like *Phillips*, but also to units engaged in various other non-retail (manufacturing and processing) operations. In the *Wolferman* case, *supra,* the Eighth Circuit held the exemption inapplicable to a kitchen located in one of the retail outlets but engaged in making candy and salad dressing for other retail outlets as well. Thus, these courts have recognized the *Phillips* rationale as applicable to any physically-separate non-retail unit of a multi-function business.

D. *The decisions on which respondent has relied are inapposite and serve to confirm the error of the ruling below.*

1. Respondent has cited *Mitchell* v. *T. F. Taylor Fertilizer Works,* 233 F. 2d 284 (C.A. 5) (decided subsequent to the decision below), as a case "which is the closest on its facts to the instant case that we have found" (Br. in Opp., p. 17). Apart from the quite different factual situation in *Taylor Fertilizer* (which involved a two-unit business composed simply of a processing plant and its sales office, in contrast to respondent's large chain organization), that decision serves to highlight the error of the decision below and "the possibilities of abuse" inherent in a loose construction of the term "establishment," which Congress ex-

pressly undertook to forestall in enacting the 1949 Amendments.

The Fifth Circuit there held that a fertilizer mixing plant located in the industrial part of Moultrie, Georgia, was simply an adjunct to a general sales office located five blocks away in the business district, and that the plant and sales office were "functionally an entity" and constituted a single exempt retail establishment under Section 13(a)(2) and the new Section 13(a)(4) added by the 1949 Amendments (see App. A, *infra*, p. 34), 233 F. 2d at 286.[8] This decision, like the decision below, rejected the "distinct physical place of business" concept in favor of the "functional" integration standard, with the result that the separate fertilizer processing plant, which, if not an ordinary factory was certainly a substantial processing enterprise uncharacteristic of a typical retail establishment, was held exempt as an adjunct to a retail sales office. This is not only contrary to the terms of Section 13(a)(4) which limits the processing aspects of the exemption to "processes at the retail establishment," but is directly opposed to the expressed legislative assurances that this section was not intended, and could not reasonably be construed, to exempt "manufacturing establishments, as such,"

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[8] The potentialities for the abuse of the new Section 13(a)(4) exemption (App. A, *infra*, p. 34) occasioned lengthy legislative discussions (see *e.g.*, 95 Cong. Rec. 11200, 11216, 12498-12506, 12510-12519, 12533-12534, 12579, 14942). It was because of these potentialities that the sponsor of Section 13(a)(4) explicitly stated that the exemption was premised on the restrictive meaning of the term "establishment," as construed in the *Phillips* case, "so as to safeguard against any abuses * * *" and "not to embarrass the administrators of the Act by bringing in the large producers who might be extensive manufacturers, but only small retailers, who are strictly retailers * * *" (95 Cong. Rec. 12579).

"merely because such establishments have, or create, a retail outlet," and that "The section does not permit the tail to wag the dog" (95 Cong. Rec. 11216, 14942).[9]

In any event, there is a marked contrast between the multi-unit, multi-function "Divisions" of respondent's enterprise and Taylor's two-unit business consisting of a processing plant serving exclusively its *single local retail sales outlet*. It is equally plain that respondent's extensive non-retail functions, unlike Taylor's fertilizer processing, are not performed as an incident to respondent's local retail sales or services, but are of a distinctive character adapted to the needs of its *non-retail* customers, and unrelated to its retail services except for

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[9] That the *Taylor* decision is an unwarranted expansion of the exemption is clear from the Statement of the House Managers accompanying the Conference Report on H. R. 5856 (Rept. No. 1453, Oct. 17, 1949, 95 Cong. Rec. 14928-14935), listing among the conditions upon which the exemption depends: "Third, the goods which the exempt establishment makes or processes must be made or processed *at the establishment which sells the goods*" (emphasis added). That this was not intended to refer to a geographically-separate processing plant is evident from the specific examples cited in which the exemption might apply "despite the fact that there is a physical dividing line between the manufacturing portion of an establishment and the selling portion *such as a partition, wall*, etc. For example, a bakery will meet the test even though it bakes its bread and pastries *in a back room* and sells same in *a front room of its establishment*. This exemption will apply typically to bakery establishments which bake the breads and pastries which they sell, ice plants which manufacture the ice they sell, and ice cream parlors or candy kitchens which make their own ice cream or candy" (95 Cong. Rec. 14932, emphasis added).

While we believe the *Taylor* decision to be erroneous, no petition for certiorari was filed in that case because the peculiar nature of the fertilizer business and the special character of Taylor's operations are not thought to be sufficiently representative of the general problem presented by the new Section 13 (a) (4). Also, it may be that review and reversal of the decision below in the instant case may suffice to resolve the problem which is now developing under Section 13 (a) (4).

for the fact that they are combined in a "hybrid" enterprise.

2. Respondent's reliance upon decisions construing State unemployment compensation statutes (Br. in Opp., pp. 32-33) reveals the extent of the departure by the decision below from the purpose of the exemption here in issue. Both the statutory policy and the context of the term "establishment," as used in the State unemployment statutes, are so dissimiliar from the present problem that this Court, in *Phillips,* did not even feel it necessary to mention the decisions on which respondent here relies, although both the petitioner (A. H. Phillips, Inc.) and the American Retail Federation, *amicus curiae,* relied on *Chrysler Corp.* v. *Smith,* 297 Mich. 438, 298 N. W. 87, and *Spielmann* v. *Industrial Comm.,* 236 Wisc. 240, 295 N. W. 1.[10]

The term "establishment" in the unemployment compensation statutes is in the context of a disqualification of unemployment due to a labor dispute "at the establishment" (nine States) or "at the factory, establishment or other premises" (majority of the States) at which the claimants are employed. Even if it be assumed that a broad interpretation of the term "establishment" is warranted under the policy of those statutes to prevent the use of unemployment funds in support of strikes or labor disputes,[11] the reason underlying such a broad interpretation is palpably inapplicable, and indeed diametrically opposed, to the limited purpose of the retail establishment exemption in the Fair Labor Standards Act. In the one case, the

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[10] Compare brief for A. H. Phillips, Inc., pp. 7-8, and brief of American Retail Federation, p. 18.

[11] But see the strong dissenting opinion in the *Chrysler* case, 297 Mich. at 454-476.

statutory policy to disqualify unemployment due to labor disputes might well be frustrated by ignoring the practical fact that, normally, a labor dispute in one unit leads to unemployment in related units of a functionally-integrated enterprise. On the other hand, the functional integration of a large multi-function enterprise, which admittedly is engaged extensively in interstate and non-retail functions, is scarcely a sound reason for broad interpretation of an exemption designed only to exempt "small local retailers, who were the sole concern of Congress in Section 13(a)(2)" of the Fair Labor Standards Act (324 U. S. at 498).

As this Court has repeatedly cautioned, the coverage of this Act is to be liberally construed and its exemptions strictly interpreted,[12] regardless of decisions construing different statutes, even though the other statutes may be "similar." See *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 131; *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427. If decisions construing "similar" federal statutes are not applicable, it cannot be gainsaid that decisions construing completely dissimilar State statutes are clearly inapposite. Indeed, the Court has held, in a decision under this Act, that the same word may not mean the same thing each time it is used, even though in the same statute, but must be

[12] The Court has said that an exemption from the coverage of the Fair Labor Standards Act should be "narrowly construed" and limited to situations "plainly and unmistakably within its terms and spirit." See *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 517; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 617. The principle of strict construction of the exemptions is essential if the Act is to have the "sufficiently broad coverage" that is "vital to its mission" and basic purpose "to eliminate substandard conditions * * * on a wide scale throughout the nation." *Roland Co.* v. *Walling*, 326 U.S. 657, 669-670; *Powell* v. *United States Cartridge Co.*, 339 U.S. at 510, 516-517.

construed in its particular context. See *Farmers Reservoir and Irrigation Co.* v. *McComb,* 337 U. S. 755, where the word "produced" in the agriculture *exemption* was held to have a different and more limited meaning than the definition of "produced" for *coverage* purposes in Section 3 (j).

3. Respondent's reliance on *Tobin* v. *Aibel,* 112 F. Supp. 156 (E. D. N. Y.), affirmed 204 F. 2d 376 (C. A. 2) (Br. in Opp., p. 23), which it has cited in support of its contention that "petitioner itself has conceded" that physical separation is not determinative of a separate establishment (Br. in Opp., p. 23), reflects the same disregard for context and purpose. The issue in *Tobin* v. *Aibel* related to the application of an administrative regulation designed to protect the Act's standards by prohibiting the use of home workers in the knitted outerwear industry. This regulation broadly defined the industry *for the purpose of including all operations* in it, regardless of the division of parts of the industry among particular employers. Thus, it covered not only "knitting" but the "further manufacturing, dyeing or other finishing" of articles of knitted outerwear which are "partially or completely manufactured in the same establishment as that where the knitting process is performed" (29 C. F. R. 617.5).

The defendants in that case (a man and his wife) were engaged in the production of hairnets which are made from a knitted fabric. They sought to avoid the regulation by dividing the work between two entities (a corporation and a partnership) and by designating a physically-separate location for the distribution and collection of the homework. The issue was whether the defendants should be allowed to evade the Administra-

tor's regulation by this simple device. The decision to disregard the physical separation of the distribution point was thus no more than a practical, realistic recognition that the establishment where the knitting and partial manufacturing were performed was the same establishment using the homeworkers, and that the separate distribution point was simply a device to evade the plain purpose of the regulation. That decision has no relevance whatsoever in determining the meaning of "establishment" as used in the wholly different context of the Section 13 (a) (2) exemption.

4. The other decisions upon which respondent has relied afford even less support for the decision below, and indeed illustrate that that holding represents an unprecedented and wholly unwarranted expansion of the "retail establishment" exemption. *Burhans* v. *Montgomery Ward & Co.*, 110 F. Supp. 184 (S. D. N. Y.) and *Duncan* v. *Montgomery Ward & Co.*, 42 F. Supp. 879 (S. D. Tex.) (see Br. in Opp., pp. 27-28) were both cases involving a warehouse serving and identified *exclusively* with a *single* retail store. This is the limited situation to which respondent's quotation from the 1949 legislative history refers (see *supra*, pp. 19-20). Whether or not, prior to 1949, this limited extension of the exemption was inconsistent with the physical-separateness concept of the *Phillips* decision, Congress in 1949 apparently regarded the warehouse and store as separate establishments and felt it necessary, in order to preserve the exemption for employees in this limited situation, to do so on the basis that, although working *in* a separate establishment, they were "employed *by*" the single retail establishment for which their services were exclusively performed. These cases do not involve a substantial (if any) departure

from the physical-separateness concept of *Phillips* or from the limited purpose of the exemption. In the other case cited by respondent (*Bogash* v. *Baltimore Cigarette Service*, 193 F. 2d 291 (C. A. 4)), the employees held exempt were engaged exclusively in servicing local vending machines.

Unlike these cases, respondent's enterprise is a *chain* organization engaged in both retail and non-retail functions.[13] This suffices to require application of the physically-separate unit concept for the same reason that this concept was applied in *Phillips*—in order to restrict the exemption to the local retailing businesses which were the sole concern of Congress.

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[13] Unlike the units in the *Burhans* and *Duncan* cases, the functions of respondent's Alameda warehouse (as respondent itself emphasizes, Br. in Opp., pp. 27, 28) are not keyed to or identified exclusively, if at all, with the functions of any other single retail unit, and, unlike the *Bogash* case, the functions of Alameda are not identified exclusively with, or merely incidental to, respondent's local retail sales or services. Alameda is rather a functionally, as well as physically, independent unit of the five-unit chain comprising respondent's "Division." The "Division," although not co-extensive with respondent's entire enterprise, is nonetheless a quite extensive multi-unit, multi-function chain organization engaged in both retail and non-retail functions.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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NOVEMBER, 1956.

APPENDIX A

The Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U.S.C. 201), provides in pertinent part:

SEC. 7. [63 Stat. 912-913]:

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 13 [63 Stat. 917]:

(a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: *Provided,* That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business; or (4)

any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *

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SEC. 16. [63 Stat. 920]:

* * * * *

(c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

APPENDIX B

EXTRACT FROM INTERPRETATIVE BULLETIN No. 6, DECEMBER 7, 1938 (1940 Wage-Hour Manual, p. 154 at 157):

> 18. The question has been raised as to the scope of the term "establishment" in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. In the ordinary case, each physically separated unit or branch store will be considered a separate "establishment" within the meaning of the exemption.

Though the bulletin has been revised and reissued on several occasions, the Administrator has consistently adhered to the original interpretation of the term "establishment." The latest interpretation (15 F. R. 7245, Pt. 779.3 (b) (October, 1950) 29 CFR 1955 Supp., Sec. 779.3 (b)) reads as follows:

> SECTION 779.3.—THE "ESTABLISHMENT" BASIS FOR EXEMPTION UNDER SECTION 13(a) (2), (3), and (4):
>
> * * * * *
>
> (b) ***"Establishment" defined and distinguished.***
>
> The term "establishment" as used in section 13 (a) (2), (3), and (4) means a distinct physical place of business. The term is not synonymous with the words "business" or "enterprise" as applied to multi-unit companies. Such business organizations operate a number of establishments, some of which may qualify for exemption and some of which may not. For example, a manufacturing company which operates several places of

business for the sale of its manufactured products operates a number of separate and different types of establishments within the meaning of the exemptions. Each physically separate place of business must be considered as a separate establishment. Thus, in the case of chain-store systems, branch stores, groups of independent stores organized to carry on business in a manner similar to chain-store systems, and retail outlets operated by manufacturing or distributing concerns, each physically separated unit or branch store will, in the ordinary case, be considered a separate establishment within the meaning of the exemptions.

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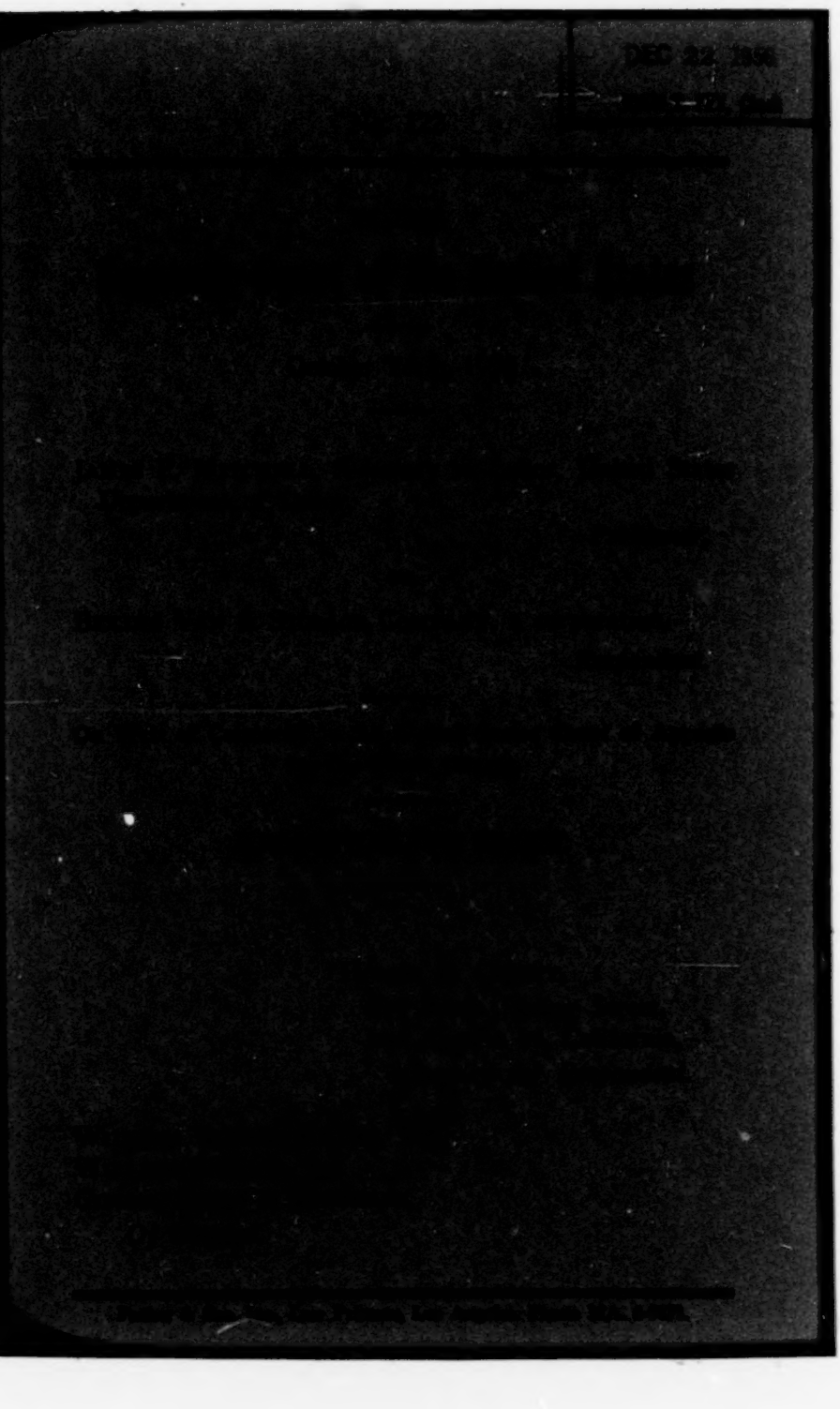

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IN THE

Supreme Court of the United States

October Term, 1956
No. 122

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Petitioner,

vs.

BEKINS VAN & STORAGE COMPANY, a corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF.

Opinions Below.

The opinion of the District Court is not officially reported. The Findings of Fact and Conclusions of Law and the oral opinion of the District Court appear in the Transcript of Record, pages 33-49, 139-147. The decision of the Court of Appeals for the Ninth Circuit is reported at 231 F. 2d 25 and appears on pages 151-161 of the Record.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 1, 1956. The jurisdiction of this Court was invoked by the Petitioner under 28 U. S. C. Section 1254(1) (1952). The Petition for a Writ of Certiorari was granted October 8, 1956.

Statute Involved.

The statute involved is the Fair Labor Standards Act, as amended (52 Stat. 1067 (1938), as amended 63 Stat. 917 (1949), 29 U. S. C. Section 213(a)(2).) The particular provision is Section 13(a)(2) which provides an exemption from certain requirements of the Act for retail and service establishments. This section reads:

> "The provisions of sections 6 and 7 shall not apply with respect to . . . any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry. . . ."

Question Presented.

Is the smallest management, operating and business unit of a moving and storage company a single *establishment* within the meaning of Section 13(a)(2) of the Fair Labor Standards Act, as amended, even though parts of its activities are conducted in geographically separate buildings?

Statement of Facts.

Respondent is engaged principally in the business of moving and storing of household goods within the State of California. It is also engaged in the moving of used office equipment and furniture, the moving of stores and commercial operations, rug cleaning, fur storage, and rental of office and building space. Its principal place of business is located in Los Angeles, California [Fdgs. 4, 6; R. 35-36, 59-60]. Respondent's principal business is an exempt activity under Section 13(a)(2). The Secretary of Labor (hereinafter referred to as Petitioner) does not question this status except for one building [Fdg. 1; R. 34, 11].

Respondent's business consists of 19 divisions all located within the State of California. The division is the basic organizational unit of the Company. It is the smallest unit which has functional or operational identity. Each division contains one or more warehouse buildings where goods are packed, stored and handled. There is a total of 36 such buildings. Some divisions have only one building; others have more than one. There are twelve divisions in the Los Angeles area, as follows: Hollywood, Beverly Hills, Compton-Lynwood, Glendale, Wilmington, Inglewood, Long Beach, San Fernando Valley, Pasadena, Santa Ana, Santa Monica, and East Los Angeles [Fdgs. 5, 8; R. 35, 36].

Originally Respondent's operations in the Los Angeles metropolitan area were organized with a West Los Angeles Division and an East Los Angeles Division. The West Los Angeles Division included Hollywood, West Hollywood, Beverly Hills, and Santa Monica, and the East Los Angeles Division consisted of the present geographi-

cal area [described in Fdg. 10; R. 37-38]. Prior to 1946, following Respondent's policy of decentralization insofar as practicable, the West Los Angeles Division was divided into the Hollywood, Beverly Hills, and Santa Monica Divisions. In 1946 and again in 1950, the Company gave thorough consideration to dividing the East Los Angeles Division into smaller units but on each occasion decided that it was not practical nor feasible to do so [Fdgs. 8, 9; R. 36-37].

The business of Respondent was commenced in 1895 in Los Angeles. Since that time it has grown and expanded, principally with respect to the moving and storage of household goods. Because of expansion and growth, it has been necessary from time to time for it to acquire new warehouse space or warehouse additions. This space, for historical reasons resulting from the growth of Los Angeles, was provided in separate buildings. [Fdgs. 6, 7, 16; R. 35-36, 42, 92-95, 138.] The East Los Angeles Division consists of five buildings of which one is the Alameda building. The Division office is located in another building of the Division located on Figueroa Street in Los Angeles. The Alameda building is approximately 1¾ miles from the Figueroa building; the other three are from 1.8 to 3.5 miles from Figueroa [Fdg. 10; R. 38.]

Petitioner contends that just one of the buildings, comprising the East Los Angeles Division, the Alameda building, is a separate "establishment" and as such fails to meet the test of exemption as a retail or service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act, as amended. Respondent contends that the Division, rather than just a physically separated building which is a part of the Divi-

sion is the "establishment" within the meaning of Section 13(a)(2). If the Division, not the building, is the establishment, Petitioner concedes that it meets the tests for exemption. If the building is the establishment, it does not meet such tests [R. 18].

The Company could carry on its operations within the East Los Angeles Division as well or better if all of its business were carried on in a single large building instead of in five buildings geographically separated [Fdg. 16; R. 41-42].

All of the management, executive and administrative functions of the Division are performed by individuals whose principal office and location is at the Division office and who give direct orders to and supervise the employees at all five buildings in the East Los Angeles Division. These individuals make daily visits to each of the buildings in the Division. They include a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager, and a storage manager. Each of these individuals performs his duties in his respective field for the entire East Los Angeles Division. Together they are responsible for the success of the operations of the Division as a whole. No one is responsible only for the success of the Alameda building or any one of the other buildings in the Division. The division manager in charge is responsible for *all* operations within the particular division. No management functions are performed separately for any one building. [Fdg. 17; R. 42-43].

Each of the buildings within the East Los Angeles Division contains warehouse space, loading docks, packing equipment and yard area for the servicing and operation of moving vans. The Division is responsible for providing moving and storage and other services through-

out its territory. The territory is not further subdivided or broken down. No part of the territory is allotted to any particular building. [Fdgs. 11, 18, 19; R. 38, 42-43].

The only significance which the Alameda building, or any of the other buildings, as such, has is that it is geographically separated from the office of the Division and from the other buildings utilized by the Division.

The Alameda building is an integral part of the Division as shown by the following additional facts:

(1) Substantially the same function of packing, storing and moving goods of various kinds, both commercial and household, is performed in each of the five buildings [Fdgs. 5, 11; R. 35, 38].

(2) The highest level of supervision at Alameda is that of working foreman, a position which involves manual work. All other supervision is provided by the Division [Fdgs. 12, 13, 17; R. 39-40, 42-43].

(3) All dispatching and orders are handled from the Division office [Fdg. 18; R. 43].

(4) Sales activities are conducted on a division basis, and sales territory is allocated without regard to location of individual buildings. Almost all contact with customers is handled by the Division [Fdgs. 19, 20; R. 43-44].

(5) The working force in the Division is interchangeable; employees are frequently and regularly shifted between buildings [Fdg. 21; R. 44].

(6) Records for operations in all buildings, including payroll records, are kept only at the Division office. A single system of accounts and records for operations at all buildings is maintained for the entire Division at the Division office with no separate accounts at or for the

individual buildings. No separate financial statements are made for each building; all are on a division basis. Only one bank account is maintained for the entire Division [Fdgs. 14, 22-24; R. 40, 44-45].

(7) All supplies used by the various buildings are purchased either on a company-wide or Division-wide basis [Fdg. 25; R. 45-46].

(8) Repair and maintenance of automobile equipment is handled only on a Division-wide basis [Fdg. 25; R. 46].

(9) All employees of the Division involved in this litigation are represented by a single local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of North America; one collective bargaining agreement applies uniformly to all [Fdg. 27; R. 46-47]. Seniority and other provisions have no applicability for the Alameda building alone but operate on area-wide basis [R. 20-33].

Of the employees working within the Division, there are 11 who work in the Alameda building. Of such 11 employees, one is a warehouse foreman who performs manual work but who is exempt under the Act as a supervisor, and two are office workers who receive overtime compensation equal to that required by the Act. The remaining employees are warehousemen. These employees and others in the Division are regularly transferred to and from the other buildings in the Division. Except for such employees and the corresponding employees in the other buildings, all employees, including management, supervision, sales, dispatch, office, et cetera, are located at the Division office [Fdgs. 12, 17; R. 39-40, 42-43].

It would not be practical, economic or good business practice for Respondent to divide its East Los Angeles

Division into smaller management, administrative or operating units because (a) the cost of doing so would be much greater than the present costs, (b) the present single administration, management and operation permit much greater flexibility which is required for the kind of business done by the East Los Angeles Division as a whole, and (c) the type of work being handled by Respondent requires the present method of management, administration and operation [Fdg. 26; R. 46, 131-132].

Developments Subsequent to Decision Below.

In connection with this statement of facts, Respondent desires to point out certain developments which have taken place subsequent to the decision of the Court below in this matter.

On April 1, 1956 the collective bargaining agreement between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of North America and the van and storage industry of Los Angeles and Orange Counties, to which Respondent was a party, expired. The expired contract did not provide for overtime compensation on Saturdays. Following negotiations between the industry and the union a new agreement was reached which is now effective and to which Respondent is a party. The negotiations on behalf of the industry were conducted by a committee of five members representing some 55 companies comprising the substantial majority (possibly 85 to 90%) of the moving and storage business of this area. All companies sign identical substantive agreements. Respondent has one representative on the negotiation committee. A copy of the new agreement is set forth in the Appendix.

Among other things this agreement provides for the payment of time and one-half the regular hourly rate for all work performed on Saturdays as well as on Sundays. The regular workweek is from Monday through Friday, inclusive. The collective bargaining agreements between the parties have in the past provided and the newly negotiated agreement continues to provide for time and one-half the straight-time hourly rate for work performed in excess of eight hours in any one day during the regular workweek. The contract is for a five-year period with wages, pension plan and security fund payments only subject to reopening on anniversary dates during the fourth and fifth years. The employees involved herein are covered by the agreement.

By contractual obligation therefore, upon an industry basis, with one of the strongest unions in the country, the requirements of the Fair Labor Standards Act concerning the payment of overtime, the principal basis of this litigation, have now been met. As a result the necessary payroll records will be kept.

Statement of Legal Issue.

The issue of law concerns the meaning of "establishment" as that term is used in Section 13(a)(2) of the Act, as amended. Petitioner contends that the Alameda building alone is an "establishment." Respondent contends that the East Los Angeles Division is the "establishment." Petitioner concedes that if the Division is the "establishment" within the organization of Respondent, it is exempt as a retail establishment within the meaning of Section 13(a)(2) [R. 18].

Summary of Argument.

Respondent contends that the unanimous decision of the Ninth Circuit affirming the decision of the District Court is correct and should be affirmed because:

(1) The Division, rather than merely a physically separate building which together with other buildings comprise that Division, is the "establishment." All of the functions which comprise a place of business or an operating business unit—management, executive, administrative, operating, financial, banking, record keeping, employee relations, sales, customer contact, dispatching purchasing orders, accounting, supplies, repair and maintenance and all supervision above the level of working foreman—are conducted upon a Division basis. These are the factors which constitute functional identity for any business unit. Only the physical work involved in handling and storing goods in the Alameda building and work directly incidental thereto, is performed in that building. The Division, not a building which is only a physical location for part of the work of the Division, is the smallest business and operating unit of the company with functional identity [Fdg. 8; R. 36].

(2) Petitioner's case is based only upon the separate geographical location of that building, contrary to the position that Petitioner itself has taken in other cases. Physical location alone is not a sufficient basis upon which to determine the existence of an establishment; otherwise every shed would be an establishment. While it may be an item, the controlling factors involve functional identity and customary business organization, operation and purpose. The purpose and application of Section 13(a)(2) requires the consideration of these factors, particularly in the light of its legislative history.

(3) No case that we have been able to find supports the position of Petitioner. To the extent that it is applicable, *Phillips v. Walling* (1945), 324 U. S. 490, upon which Petitioner almost entirely relies, supports the position of Respondent. The decision and the facts upon which it is based clearly demonstrate that customary business organization, functions and practice must be considered. That case does not support the proposition that separate physical location is a controlling factor; the issue was not even involved there. Decisions since the *Phillips* case confirm the correctness of Respondent's position.

(4) Petitioner argues at length that Section 13(a)(2) was designed to exempt only "small local retailers" and that it was not designed to exclude "large multi-function interstate enterprises" (Pet. Br. 12). Yet, except for one building, Petitioner does not question the exempt status under Section 13(a)(2) of the business or operations of Respondent or of the East Los Angeles Division if that is determined to be the establishment. Petitioner's argument is clearly irrelevant since it would apply to not just the Alameda building but to Respondent's entire business as well, which Petitioner except for Alameda does not question as exempt.

(5) The interpretation of the term "establishment" under the various unemployment compensation statutes supports the position of Respondent. Similar considerations are involved in the application of those statutes.

(6) No justicible controversy is presented to the Court, the case having become moot.

ARGUMENT.

Preliminary Statement.

Petitioner continuously refers to Respondent's business among other things as "a huge enterprise," as "the largest storage company in the United States," and as a "large multi-unit, multi-function interstate chain enterprise" (*e. g.* Pet. Br. 3, 12, 13).

Despite this argument by characterization, the simple fact is that Respondent is principally engaged in the storing and moving of household goods within the State of California, an activity which Petitioner himself concedes to be exempt as a retail and service establishment within the meaning of Section 13(a)(2). By the Administrator's own regulation, this activity is exempt.

> *"Section 779.10*
>
> "(a) *Types of establishments whose sales or services may be recognized as retail:*
>
> * * * * * * * *
>
> "Household furniture storage and moving establishments."
>
> 29 C. F. R., 1955 Supp., Sec. 779.10

Petitioner does not contend that any of Respondent's warehouses either in the East Los Angeles Division or elsewhere fail to meet the tests of exemption as a retail or service establishment within the meaning of Section 13 (a)(2) of the Act, except only the Alameda warehouse [Fdg. 1; R. 34, 11].

Thus the exempt status of Respondent in its major—almost entire—operation is not questioned. Eighteen of the 19 divisions and 4 out of the 5 buildings of the 19th Division may be considered to be exempt, based

on the position taken by the Petitioner. There is only one building out of Respondent's whole operation which Petitioner contends is not exempt.

The fact that a "huge" or "multi-unit, multi-function interstate enterprise" may be involved (quite aside from the meaning or accuracy of these terms) would of course be just as significant in determining the exempt status of Respondent's other divisions or buildings. These characterizations would be just as applicable whether the Alameda building or the East Los Angeles Division is the establishment. Yet Petitioner concedes that one or the other is the establishment [R. 18]. Whether true or not such characterizations have not affected the exempt status of Respondent's business, other than Alameda, in the viewpoint of Petitioner himself. They are obviously irrelevant. And they comprise much of Petitioner's brief.

Petitioner makes much of the fact that commercial goods are handled in the Alameda building. He does so by referring to the size of the building, its location and facilities, and by pointing out, for example, that Alameda has a railroad siding and railroad loading docks (Pet. Br. 5). Petitioner overlooks the fact that all of the warehouses except one regularly engage in handling commercial goods, that ten of the warehouses have railroad sidings, and that various of the warehouses handle, pack, and store substantial quantities of goods which are received from and shipped to out-of-state points [Fdg. 5, R. 35]. Yet Petitioner does not question the status of any of these warehouses as exempt under Section 13(a)(2).

Nor can the contention successfully be made that the Alameda building should be a separate establishment be-

cause more commercial goods may be handled there than in the other buildings.

Congress has eliminated the distinction formerly drawn by the Administrator between sales and service to commercial users and sales and service to non-commercial users. Sales and service to commercial users can be retail as well as those to non-commercial users.

The House Managers' Statement* explaining the bill which amended Section 13(a)(2) in 1949 states:

> "The amendment (Sec. 13(a)(2)), agreed to in conference clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co. v. Walling* (326 U. S. 657); *McComb v. Diebert* ((E. D. Pa. 1949), 16 Labor Cases, Par. 64,982); *McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio 1948))."
>
> H. R. Rep. No. 1453, 81st Cong., 1st Sess. (1949); 95 Cong. Rec. 14931 (1949).

Senator Holland, the sponsor of the amendment in the Senate which was later enacted into law, in criticizing the position of the Administrator concerning business or commercial sales, said concerning the Amendment:

> ". . . we propose to do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which regardless of the size, and regardless of the fact that it is intrastate,

---

*This was the only report concerning the amendment considered by Congress prior to its enactment.

> can never be held to be a retail sale under the regulations or under the interpretative rulings of the Administrator."
>
> 95 Cong. Rec. 12498 (1949).

The intent of Congress to eliminate this distinction is very clear from the lengthy debate on the subject as well as from the House Manager's Report.

> See: 95 Cong. Rec. 11423 ff., 11217 ff., 12487 ff., 12718 ff. (1949).

In this connection, it will also be noted that throughout its brief, Petitioner refers not to the "wholesale" function (which was involved in the *Phillips case* infra*), but rather refers to what it designates as the "non-retail function" (*e.g.* Pet. Br. 8). This distinction was criticized and rejected by Congress in connection with the amendment of Section 13(a)(2) in 1949. Senator Taft in debate supporting the adopted amendment stated:

> "Under this concept, the Administrator, with some support from the courts, made rulings in the case of those selling automobiles, under which, if I buy an automobile for my own use, for ordinary pleasure purposes, that is a retail sale, but if an automobile salesman sells a truck to a commercial establishment, that is not a retail sale. He does not dare say it is a wholesale sale, because we all know it is not a wholesale sale. He says it is a nonretail sale."
>
> 95 Cong. Rec. 12516 (1949).

Petitioner recognizes as well here that there is no "wholesale" function as in *Phillips*. He therefore refers to a "non-retail activity"—a rejected concept.

---

*(1945) 324 U. S. 490.

As will be shown below, the Alameda building is by no means comparable to a retail store as Petitioner argues (Pet. Br. 15). If such a comparison is proper the retail store is comparable to the Division. Indeed if a retail store consisted of five buildings, the comparison with the Division would be complete. Furthermore, Respondent could carry on all of its business within the Division as well as or better if the East Los Angeles Division consisted of a single large building instead of five geographically separated buildings [Fdg. 16; R. 41].

Petitioner devotes a substantial portion of his brief to re-arguing the *Phillips* case (*e.g.* Pet. Br. 11-17). We do not quarrel with the correctness of that decision. Petitioner ignores what we consider to be rather obvious factual distinctions between that case and this. His comparisons which are very general are also invalid. The issue decided there is quite different from that presented in this case, as argued below. That case to the extent that it is applicable, supports Respondent's, not Petitioner's position. Indeed, Petitioner is quite inconsistent in certain of his positions which he advocated in that case as compared with the position he has taken in this case.

Petitioner contends that if Respondent's position were accepted, Respondent could, by its own act, determine whether or not a given activity constituted a retail or service exemption (Pet. Br. 16-17). Presumably any business could do so merely by tailoring its activities to the exemption requirements of the Act. There would be nothing improper in doing so, if this were one of the main concerns in operating a business.

In this case, however, Petitioner's argument is meaningless for at least two additional reasons: (1) Respondent has operated its business in substantially the same manner for over half a century; (2) Respondent could as well by its own act determine whether a given activity constituted a retail or service establishment even if Petitioner's argument were accepted. Since all of the divisions handle commercial goods except one, Respondent could just as well defeat Petitioner's position merely by adjusting the proportion of commercial goods that were handled in the various buildings. The fact that it has not done so is a clear indication that it is operating its business for purposes other than to defeat the requirements of the Act.

The Court below stated in this respect:

> "Here the defendant's pattern of business with central control at one of the area warehouses existed before the adoption of the act. No one suggests that Bekins has adjusted its business to try to get around the act" [R. 152].

I.

The Separate Physical Location of a Building Comprising Only a Part of the Smallest Operating Business Unit With Functional Identity, Does Not Constitute It a Separate "Establishment" Under Section 13(a)(2). Customary Business Organization and Practice Are Controlling Considerations.

A. The Facts Establish That Alameda Has No Identity Except as a Physical Location; Its Integration With the Division Is Complete.

The Alameda building is clearly not a place of business or an operating business unit in any ordinary or usual sense. It has no functional identity in any business sense. The only function performed there is the physical one of moving and storing goods and directly incidental activities in connection therewith. This involves only those employees necessary to accomplish this work together with those who are required to directly supervise the work of such employees at the first level—the working foreman. *All other functions which comprise a place of business or an operating business unit—management, executive, administrative, operating, financial, banking, record keeping, employee relations, sales, customer contact, dispatching, purchasing, orders, accounting, supplies, repair and maintenance, and all supervision above the level of working foreman—are handled on a division basis.* The division is the smallest operating business unit of the company with functional identity [Fdgs. 13, 17-25; R. 39, 42-46].

The same functions of packing, storing, and moving of goods are performed in each of the five buildings. No territory is allotted to or served by each building; this is also done on a division basis. The working force is in-

terchangeable. Employees are regularly and frequently shifted among the buildings within the Division. All employees within the Division are covered by a single agreement with the Teamsters Union. This agreement has seniority and all other provisions applicable area-wide. There is, for example, no separate seniority status for the Alameda or any other building. The same is true with all other provisions of the agreement [Fdgs. 16, 19, 21, 27; R. 41-42, 43, 46-47].

The Alameda building is part of an integrated operation only physically removed from the management offices of the Division. The building could be a physical part of the Division office without any significant change being necessary in the organization or operation of the business [Fdg. 16; R. 41-42].

Indeed, it was specifically found by the trial court that Respondent could carry on its operations in the East Los Angeles Division as well or better if all of its business in the Division were carried on in a single large building instead of five buildings geographically separated [Fdg. 16; R. 41-42].

In this connection, the Court below stated:

> "To this court, an important factor here is that if it were not for financial or capital problems and the necessity of using what one has, it would be quite feasible to conduct, and Bekins probably would conduct, the business of the five warehouses in one central warehouse under one roof" [R. 153].

Several of the Company's divisions consist of only one building [Fdg. 5; R. 35]. Petitioner fails to show any valid reason why a division with more than one building should be treated differently from a division with only one building.

Petitioner's case must be based upon the fact that the Alameda building is separated geographically from the Division office. Petitioner must concede that all of the business functions other than the physical work of moving and storing goods and the supervision and office work directly incidental thereto, are conducted upon a division basis.

If Petitioner's contention were adopted where would the line be drawn? If because of lack of warehouse space in a large central warehouse, part of the warehouse space were obtained in an immediately adjacent building directly connected by passageways with the main warehouse, or if an additional floor were added, would either then become a separate establishment? What if the building were moved across the street connected by an overhead walkway? Would it make a difference if the walkway were then removed? Certainly Congress could never have intended that the removal of so tenuous a connection should be the criterion in determining whether or not a separate establishment existed. Would the result then be different if the building were moved a block or two away? It seems very clear that physical location alone cannot be the controlling factor.

Judge Carter at the trial stated:

> "What constitutes an establishment will depend upon the particular facts in each case. Certainly it cannot be determined by the application of a geographical yardstick. For example, whether a warehouse used by a retail establishment is in an adjacent building, across an alley, across a street, around the corner or a mile or two away, is certainly not the test for determining whether the warehouse and the retail store constitute one establishment" [R. 142].

* * * * * * * *

"If these five warehouses were located side by side down on Figueroa Street, I don't think plaintiff would seriously contend that they were separate establishments. Or suppose four of them were located there and one of them was located out where it has a spur track, I don't think there would be any contention that they are separate establishments" [R. 146].

This conclusion was unanimously affirmed by the Court below, the Court stating:

"The unit of operation of Bekins seems to be the 'division.' Doubtless, the secretary would not take the position he does here if the buildings were side by side, although separate. It does not seem unreasonable to consider the five warehouses, generally in downtown Los Angeles within a limited radius, as one establishment." [R. 152.]

In answering a contention that a foundry and machine shop constituted separate establishments for unemployment compensation purposes, because of differences in type of work, terms of employment, immediate supervision and union representation, the Supreme Court of Kentucky in *Snook v. International Harvester Co.* (Ky., 1955), 276 S. W. 2d 658, discussed below, said:

". . . To follow their argument to its logical conclusion, each *employee* would constitute a separate establishment because he is separately employed, works under different conditions, has a different seniority, etc." (Emphasis by the Court.)

Snook v. International Harvester Co., 276 S. W. 2d at 661.

We believe that ordinary and customary business practices are determinative in this case. There is much authority to support this result, but none to support the contrary result.

B. Section 13(a)(2) as Amended.

The language of Section 13(a)(2) (quoted on p. 2, *supra*) is most relevant as applied to the facts in this case. It will be noted that the section specifically refers to "annual dollar volume," to "sales of goods or services," to "not for resale" and to the "particular industry." Put together the reference is to the annual dollar volume of sales of goods or services made by the establishment within the state in which the establishment is located.

The clear purport of this section denies any reference to geographical location alone as being a criterion in determining the application of the exemption. The reference is to an operating business unit with functional identity. How else could the annual dollar volume of sales be determined? Not one of the references in the section would apply to the Alameda building. If it were determined to be an establishment, how could its annual dollar volume be determined? The Company would have to fundamentally alter its method of doing business carried on for half a century. Dollar value sales records and all other accounting and sales management methods are determined on the basis of the Division [Fdgs. 17-25; R. 42-46].

It is therefore clear that if geographical locations were a controlling factor, the tests which Congress adopted would have to have been otherwise stated. The fact that they were stated as they were shows that it is not the geographical location of a particular building which is to control, but rather the existence of a place of business or an operating functional unit thereof.

C. The Legislative History of Section 13(a)(2).

The legislative history preceding the 1949 amendments to the Act emphasizes the fact that Congress had in mind some reasonable relationship to ordinary business practices.* In this case the business practices of Respondent have been substantially the same since its founding in 1895. Under those practices a single warehouse has had no significance as a separate business unit. It has merely been a physical part of the basic unit of the business, the division [Fdgs. 6-9, R. 35-37]. To ignore these business practices would not only do violence to the clear intent of Congress but would base a distinction upon considerations that are not significant in a business operation.

The legislative history of the amendment to Section 13(a)(2) shows that physical location is not a controlling criterion in the application of that exemption. In the *House Manager's Statement*** explaining the bill which was later enacted without change, the following is stated:

> "The location of the establishment, whether in an industrial plant, an office building, a railroad depot,

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*Petitioner states that Respondent has contended that "the basic purpose of the original Section 13(a)(2) exemption has been entirely changed" by the 1949 amendments (Pet. Br. 17). Petitioner has not made such a contention. It was erroneous interpretations of the Administrator, among other things, which Congress specifically stated it was correcting. (See *e.g.* 95 Cong. Rec. 14931 (1949).)

**This was the only report concerning the amendment considered by Congress prior to its enactment.

Petitioner quotes from a document entitled "Statement of the Majority of Senate Conferees." (Pet. Br. 18-19.) This document is not a part of the legislative history of the 1949 amendments. It concededly represents the views of three senators only and was not before the Senate during the debates. It was inserted in the record *after* the amendments were passed by the Senate (95 Cong. Rec. 14870-2).

or a Government park, etc., will make no difference in the application of the exemption.

". . .

". . . Since, however, the exemption does apply to any employee employed 'by' an exempt retail or service establishment, it is applicable to employees of an exempt retail or service establishment working in a warehouse operated by and servicing such establishment exclusively, *whether or not the warehouse operation is conducted in the same building as the selling or servicing activities.*"

H. R. Rep. No. 1453, 81st Cong., 1st Sess. (1949); 95 Cong. Rec. 14932 (1949).*

Senator Holland, the sponsor in the Senate of the amendment to Section 13(a)(2) which was later enacted into law, had the following to say concerning the interpretation of that section in the light of business realities:

". . . The Congress used the terms 'retail' and 'service establishment' *in their customary meaning, in their customary application, as they were customarily understood in the various industries of the Nation.* How anyone, now, could oppose the giving of that concept to complete reality through this amendment, I fail to see, because it would simply carry out clearly what was the intention and objective of those who offered the original act, and those who voted for it and brought it to passage."

95 Cong. Rec. 12502 (1949).

Concerning the meaning of a retail sale or service, Senator Holland stated:

". . . The question is what constitutes a retail sale and what constitutes service, and in each case that

*Italics ours unless otherwise noted.

is not defined in the act, but instead is defined variably in various industries by determining what are the habits and practices in the industry.

". . .

". . . There could be various criteria which could be applied, one of which of course would be the conclusion of the trade association in the particular industry. But that is only one criterion. Others would apply. The well-settled habits of business must be applied. They will not necessarily be the same in all trades or businesses."

95 Cong. Rec. 12510 (1949).

These and others are clear expressions of Congressional intent. Contrary to Petitioner's effort to dilute the significance of these statements, the legislative history repeatedly refers to customary business practices and well settled business habits and denies any such emphasis upon mere physical separateness which is the basis of Petitioner's position.

In the cases which are discussed below, there has been a consideration of business practices in determining the meaning of the term "establishment." *In no case including* Phillips *that we have found has physical location alone been found sufficient to justify a finding that a separate establishment exists.*

D. Petitioner Itself, in Other Cases, Has Taken the Position First, That Geographical Considerations Are Not Controlling, and Second, That Business Usage and Practice Must Be Considered.

Petitioner itself has conceded, indeed urged, in actions under the Fair Labor Standards Act, that a separate physical location should not determine the existence of a separate establishment.

In *Tobin v. Aibel* (E. D. N. Y. 1952), 112 F. Supp. 156, *aff'd sub nom. Durkin v. Aibel* (2d Cir. 1953), 204 F. 2d 376, Petitioner sought an injunction against the defendant restraining the use of home workers. Petitioner urged that geographically separate locations together constituted one establishment and that each separate location did not constitute a separate establishment. In adopting Petitioner's view and in granting injunctive relief, the Court said:

> "Some minor disputes are lately resolved. In the first place the defendants argue that the maintenance by them of a separate physical establishment (at East 109th Street) is of great significance. I think it is not. It must be manifest that the purposes of the act are not so easily frustrated, as in fact they would be if the act and the regulations for the particular industry were inapplicable when the operations are conducted in two physically separate premises."
>
> *Tobin v. Aibel*, 112 F. Supp. at 158.

Petitioner's effort to distinguish this case is without substance. Petitioner states that "The decision to disregard the physical separation of the distribution point was thus no more than a practical, realistic recognition that the establishment where the knitting and partial manufacturing were performed was the same establishment . . ." (Pet. Br. 30.) *This, of course, is precisely the*

contention that Respondent argues here; namely, that the existence of an establishment should be based upon practical, realistic recognition of common business organization and practices.

And in the *Phillips* case itself Petitioner, a party in that case, advocated the position which was accepted by the Court, that business usage and practice should be considered. As stated in the summary of argument preceding the case report, the Petitioner here argued:

> *"Under common business and governmental usage* each unit of a chain store system is a separate 'establishment' and a chain store warehouse is not a 'retail establishment.'
>
> ". . .
>
> "The policy of the act as a whole strongly supports the accepted governmental and business meaning of the words."
>
> *Phillips v. Walling,* 89 L. Ed. at 1096, 1097.

That position taken in the very case upon which Petitioner principally relies here, should be contrasted with the position taken in this case where Petitioner argues directly to the contrary.

Even the Administrator's Interpretative Bulletin does not establish physical separateness as the controlling factor, but rather refers to a "distinct physical place of business" stating that this is not synonymous with "business" or "enterprise" (29 C. F. R. 1955 Supp., Sec. 779.3(b)).

Petitioner states that the decision below narrowly construes the exemption (Pet. Br. 13). On the contrary, it merely interprets the exemption in the only realistic and practical way, in the manner Congress intended, and in accordance with Petitioner's argument in the *Phillips* case. Petitioner's position would in no way effectuate the policy of the Act.

II.

Appellant Relies Principally Upon the Case of Phillips v. Walling (1945), 324 U. S. 490. To the Extent That It Is Applicable, This Case Supports Respondent's, Not Petitioner's Position.

In the *Phillips* case, decided prior to the 1949 amendments to the Fair Labor Standards Act, the company operated a chain of 49 grocery stores in two states. Quite apart from the retail stores the company operated a distributing system consisting of the ordinary wholesaling function. This operation included an office building and warehouse where the employees involved worked. The office and warehouse served all of the forty-nine stores. The Court held that the employees engaged in the wholesaling operation were not exempt as being employed in a retail or service establishment under Section 13(a)(2). The principal ground for the decision was that the wholesale function did not take on the characteristics of a retail function within the meaning of the Act. While the retail stores were exempt from the Act, the wholesale operation was not.

The defendant in that case had to contend that the entire business operation of the company constituted the retail establishment even though a division of it was a wholesale operation. The *Phillips* case decided that the term "establishment" was not necessarily the equivalent of an entire business enterprise, but could be a separate operation or division within the business.

We do not take issue here with such a holding. It appears to us to be a logical result. But we fail to see how it assists Petitioner's position.

We have not contended that Respondent's entire company operation is a single establishment. We have merely

urged that the division, of which there are 19, rather than each single building which is only a physical part of the division, is the smallest unit of the company which can be constituted an establishment upon any reasonable basis.

The *Phillips* case supports the position of Respondent. It shows that an establishment is a place of business, not just a geographically separate building or location. It specifically recognizes that normal and customary business organization is a criterion that must be considered in determining what constitutes a separate establishment.

In this respect, the Court said:

> ". . . But if, as we believe, Congress used the word 'establishment' *as it is normally used in business and in government*—as meaning a distinct physical *place of business*—petitioner's enterprise is composed of 49 retail establishments and a single wholesale establishment. Since the employees in question work in the wholesale establishment, §13(a)(2) is plainly irrelevant."
>
> *Phillips v. Walling,* 324 U. S. at 496.

This holding certainly does not mean that if the wholesale establishment or any one of the 49 retail establishments was comprised of five separate buildings that each building would be an establishment.

The quotation clearly specifies that in determining the meaning of establishment, normal business practices must be considered. This statement also shows that it is not the separate physical building which is the criterion but rather the distinct physical *place of business.* The statement not only refers in the same sentence to a place of business but also to the term establishment "as it is normally used in business and in government. . . ." This is the heart of Respondent's position, namely, that the

realities of business practices and bona fide business organization must be considered in determining what constitutes an establishment under Section 13(a) (2), and it is confirmed in the one case most heavily relied upon by Petitioner.

Even the term "physical" in the quotation is dictum since the Court's decision was based upon a separate *function*, not a separate *location*.

The Court below in this respect stated:

> "The rationale of the Phillips case lies in the fact that the warehouse function historically had been that of independent wholesalers or wholesalers independent of retail grocers. The impact of the act was not to be avoided by setting up of an 'integration' of wholesale and retail functions." [R. 152.]

Petitioner, who was also party to the *Phillips* case, contended in that case that common business and governmental usage and practice should be accepted (see 26-27, *supra*). The Court agreed. But now Petitioner changes its position and makes the rather startling argument that since the *Phillips* case "it has been settled . . . that organizational structure is irrelevant in determining what is an 'establishment' " (Br. for App. before Court below, 10, 18). We believe that its first position, that advocated in the *Phillips* case, was correct. Indeed, if customary business organization and practice—functional identity and unity—are irrelevant what factors do control? According to Petitioner it must be just physical separation, an impossible test.

The *Phillips* decision did not hold that organizational structure, functional identity and unity were not considerations. On the contrary, the decision was based upon the organizational separation of basic functions, the whole-

sale versus retail. Certainly that case did not determine even remotely that any geographically separate buildings constituted an establishment. Yet that is what Petitioner must contend. If so, a shed with a single employee must also logically be an establishment.

In this connection, the Court below stated:

> "If Phillips holds that if a business is in separate buildings, each building is necessarily an establishment then, of course, this court is wrong. It hardly seems though that Phillips goes that far" [R. 152].

The factual distinction between the *Phillips* case and the instant case are at once apparent.

In the first place, the wholesale function was a separate function and business operation distinct from the retail operation. It had functional unity and identity. It was specifically compared by this Court with the independent wholesaler in function and operation. The Court states that the employees involved were performing duties which were ". . . economically, functionally and physically like those of the independent wholesaler's employees . . ." (324 U. S. at 498.) The Court would have no occasion to refer to such factors if physical location were to be the controlling criterion.

The basis of the decision in the *Phillips* case was that there was a distinction between *functions*, not between buildings. The Court thus separated the wholesale function, a separate operating part of the business, from the retail function. In the instant case there is no such separation. The integration of the Alameda building with the division is complete.

Another clear point of distinction from the *Phillips* case is the fact that in that case the wholesaling function

was of the conventional nature, distributing goods as would be true with an independent wholesaler distributing to forty-nine retail stores. In this case, the Alameda building performs no such wholesaling function. It does not service the other warehouses either in the East Los Angeles Division or in any of the other divisions. In the organization of the company and in its operation, it is on the same level and performs the same function as do the other buildings in the Division. In no sense can it be separated from the other buildings or from the Division in the manner in which the wholesale function was separated from the retail function in the *Phillips* case.

Since the *Phillips* decision only involved the question as to whether the wholesale function was separate from the retail function for the purposes of the Act, the Court was not required to consider the relationship of one retail store to the other. For the purpose of the decision, it assumed that each was a separate business operational unit—a separate retail store or establishment. *However, the case does show that each store had a manager, separate accounts, its own record of inventory and transfers of goods, and its own records of cash deposits, that each store manager prepared his own requisitions, and that each was so located as to serve distinct competitive areas so as not to supplement each other's services* (*Walling v. A. H. Phillips* (D. Mass., 1943), 50 F. Supp. 749, 750, 751).

The opinion also shows that the wholesale function would be substantially the same whether provided by an independent wholesaler or by the wholesale operation of the same company.

The foregoing circumstances refute Petitioner's contention that the five buildings of the East Los Angeles Division are "functionally no more integral a part of the

'Divisions' than the Phillips' central office and warehouse was . . . of that Company's retail stores." (Pet. Br. 8.) Petitioner's attempted comparisons are inapposite. His statement that Respondent's warehouses "are no less functionally separate than the units of a typical chain organization" is denied by the facts (Pet. Br. 15). Even the few specific allegations made to support these large conclusions are in error.

Petitioner states, for example, that "each [warehouse] has its own crew of employees . . ." (Pet. Br. 15.) This is directly contrary to the stipulated facts which are that the working force within the Division is interchangeable not only among the various operating tasks but among the various buildings within the Division. These transfers back and forth occur regularly and frequently [Fdg. 21, R. 14, 44]. The contention that the type of warehousing and function of each of the buildings within the Division are different is also contrary to the Record (Pet. Br. 15-16). The facts show the essential function and equipment of each of the buildings to be the same, and the character of the business to be determined on a division, not a building basis [Fdg. 11, 16, R. 38-39, 41-42]. The Findings of Fact are specific that the activities of the Division could be carried on as well or better if they were all located in one building [Fdg. 16, R. 41].*

In the instant case there are five geographically separate buildings merged completely in a single operating unit,

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*As an example of the necessity of operation on a division basis W. C. Elliott, Vice President of Respondent testified:

"We cannot economically operate those five warehouses except under central or one management. For example, we have a staff or crew of men at each one of the various warehouses, and we have a crew of regular employees on each piece of equipment

all rendering the same service. Together they are the smallest unit that can be considered as a "place of business" and as a single establishment. The *Phillips* case in no way denies—indeed confirms—such a result. It is not authority for Petitioner's position here.

In the *Phillips* case the basic retailing unit was the retail store (which could consist of five buildings). The comparable basic unit in the business of Respondent is the Division.

As stated by the Court below:

> "The decision here is simply that it is possible for one business located in several buildings, neither contiguous nor widely scattered, to be one establishment and that the proprietor's unit of operation and control may be considered, in a case like this one, in determining what is an establishment." [R. 153.]

It should also be pointed out that the *Phillips* case was decided before the 1949 amendments to the Act. One of the bases for the amendment was that business realities had been ignored (95 Cong. Rec. 12502 (1949)). The text of the new section shows that functional identity and customary business organization and practices are necessary considerations in its application.

There is thus no conflict between the decision below and *Phillips*.

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which the branch owns; however, we get moving jobs for, say, a group of attorneys or lawyers who would move on one particular day, Saturday, and we would have to have more than two men on each truck, so we would take the men who are regularly stationed in the warehouses and put them on the trucks to do these moving jobs. And we find on large jobs sometimes we have to have twenty, thirty men working, maybe, for a day, and another group of that many men working at night, to move a business establishment or a retail—or, for example, Hoffman Hardware Company, or an outfit like that that moves. We have to have this reservoir of highly skilled, trained furniture movers to get the business." [R. 131-132.]

III.

Decisions Since the Phillips Case Also Confirm the Correctness of Respondent's Position.

Several decisions concerning the meaning of the term "establishment" have been rendered by various courts, both before and after the *Phillips* case was decided.

The case which is the closest in its facts to the instant case that we have found was decided as recently as May 8, 1956, after this case was decided below. It is *Mitchell v. T. F. Taylor Fertilizer Works, Inc.* (5th Cir. 1956), 233 F. 2d 284. In this case some of the employees were employed at a processing plant and others were employed at a geographically separate office. One issue was whether the plant and office constituted one establishment or separate establishments under Section 13(a)(2). The Court in finding one establishment including both the plant and office employees, specifically found that the primary test was whether the plant and office were "functionally an entity" (*id.* at 286). The contention urged there, as here, that geographical separateness was controlling, was rejected. The Court said:

> ". . . the suggestion that the right to an exemption depends upon such factors as whether part of the business is separated by a partition, or is conducted in an adjoining building, or in a building across the street or five blocks away, does not recommend itself as a rational distinction; furthermore, it does not appear to have been the intent of Congress."
>
> *Mitchell v. T. F. Taylor Fertilizer Works, Inc.*, 233 F. 2d at 285-286.

The Court below concurred with this holding [R. 152]. No other decisions we have found disagree with it.

The Court in the *Taylor* case considered the legislative history of the 1949 amendment to Section 13(a)(2). It also referred to the *Phillips* case as holding that functional separation was an important factor in determining the existence of an establishment and rejected the argument that the case required mere physical separation to control the existence of an establishment.

In *Bogash v. Baltimore Cigarette Service* (4th Cir. 1951), 193 F. 2d 291, the business of the defendant was the installation and maintenance of cigarette vending machines. The defendant maintained an office and a warehouse which was used to repair and store machines not in actual use. It was contended by plaintiffs that the office and warehouse were not part of a retail establishment but rather constituted a wholesale establishment whose employees therefore did not come within the exemption of 13(a)(2).

In finding that the *Phillips* decision did not apply and that the office and warehouse did not constitute a separate establishment, the Court said:

> "There is substance in the ruling that chain store systems combine wholesale as well as retail elements into a single system which must be separated in order that the affirmative provisions as well as the exemptions of the statute may be given effect. *But this procedure may not be carried so far by the courts as to divide a genuinely retail business into separate parts,* so as to hold that the exemptions apply only to those employees who perform the act of selling. All employees employed by a retail establishment as defined in the statute are covered by the exemption."
>
> *Bogash v. Baltimore Cigarette Service,* 193 F. 2d at 294.

Again in *Montgomery Ward & Co. v. Antis* (6th Cir. 1947), 158 F. 2d 948, *cert. denied*, 331 U. S. 811, cited by Petitioner, the Court said:

> ". . . the Phillips decision does not lay down the doctrine that all employees in a building operated as a warehouse are, by reason of that fact alone, within the coverage of the Act."
>
> *Montgomery Ward & Co. v. Antes*, 158 F. 2d at 951.

Burhans v. Montgomery Ward & Co. (S. D. N. Y. 1952), 110 F. Supp. 184, involved a factual situation similar to that involved in the instant case. A retail store had warehouse space adjacent to the store. The business expanded and the company obtained an additional warehouse approximately one mile away. The business was operated as a unit consisting of the retail store with its warehouse or stockroom and the other warehouse a mile distant. The manager was responsible for the overall operation. There was a single inventory, payroll and bank account. One union represented all of the employees under a single agreement. Record keeping was for the unit. The Court determined that the *Phillips* case was not applicable to this situation and that "The warehouse in the case at bar does not in any important particular fit the description of the warehouse in the Phillips Co. case." (110 F. Supp. at 195.)

The Court said:

> ". . . The warehouse was not physically connected with the Albany retail store, but was a mile away; however, that is not determinative of the issue. In every other way it was part and parcel of the Albany retail store. It is the use made of the warehouse, not its location, that is important. * * * But if the function of the warehouse is solely to

supplement and complete the functions of the retail store, and if the warehouse is in effect operated as a part of the retail store although not physically connected with it, the warehouse would, in my opinion, be part of the 'retail establishment'."

Burhans v. Montgomery Ward & Co., 110 F. Supp. at 196.

The Court discussed the application of various Interpretative Bulletins of the Wage and Hour Administrator as follows:

"The original Interpretative Bulletin issued by the Administrator in 1938 used the term 'retail establishment' as meaning the same thing as a retail enterprise or business. The revised Bulletin (Interpretative Bulletin No. 6, June 16, 1941) in applying the term retail establishment to a multi-unit company, held that it would not mean that the entire business was a single retail establishment. Section 36 of the revised Bulletin stated that if there was *unity of ownership of all departments in the store and if they were all operated as a single store, the enterprise taken as a whole would be considered an 'establishment'* within the meaning of Section 13(a)(2). That bulletin also held that warehouses, performing 'wholesale functions', were not included in the exemption. Finally, Interpretative Bulletin, 15 F. R. 7245 (issued after the amendment of §13(a)(2) in October 1949) specifically held that employees of an exempt retail or service establishment working in a warehouse operated by and servicing such establishment exclusively, are exempt as employees 'employed by' the exempt establishment *'regardless of whether or not the warehouse operation is conducted in the same building as the selling or servicing activities'*."

Burhans v. Montgomery Ward & Co., 110 F. Supp. at 196.

The Petitioner concedes the correctness of the *Burhans* case [R. 104]. To argue its inapplicability to the instant case is to ignore the facts and rationale of the *Burhans* case.

In *Duncan v. Montgomery Ward & Co.* (S. D. Tex. 1941), 42 F. Supp. 879, the company operated a retail store business in Houston, Texas. Because of limitations of space in the downtown business area, high rents and the absence of a railroad spur, the company found it necessary for reasons of economy and efficient business operation, to have warehouse space located elsewhere for the storage, handling and stocking of its merchandise. The Court found that the retail store, including the warehouse, constituted a single establishment.

The foregoing decisions are *a fortiori* for Respondent's position here since they involve situations where the warehouses were engaged in the wholesaling function of supplying and servicing the retailing part of the establishment. The Alameda building does not service the other buildings in the division or store goods for such buildings. It is the division which services its entire area; there is no breakdown according to buildings and no designation of areas covered by each. All buildings and all employees, who constantly move from one building to another, operate on a division basis. The division is the smallest unit with functional identity.

The Cases Relied Upon by Petitioner Do Not Support Its Position.

The cases cited by Petitioner do not support its position nor are they in conflict or even inconsistent with the decision of the Court below. Most of the cases involve the same type of situation with which the *Phillips* case

dealt; each cited the *Phillips* case as the basis of decision. Each involved situations where there was functional separation; in none did geographical separateness alone control. Most were also decided prior to the 1949 amendments. One was decided before the *Phillips* case decision and reached the same result. Others, in addition, placed emphasis upon the manufacturing or production, as distinguished from the distribution or retail function.

Walling v. American Stores Co. (3rd Cir. 1943), 133 F. 2d 840, was decided prior to the *Phillips* decision. The Court stated the question before it as follows:

> ". . . The question is whether the sum total of the activity of the American Stores Company constitutes a 'retail establishment' so as to exempt the entire enterprise from the mandate of the statute."
>
> *Walling v. American Stores Co.*, 133 F. 2d at 841.

This case involved eleven warehouses in five states, seven bakeries, two canneries and numerous other businesses, as well as some 2,300 stores. The Court, not surprisingly, reached the same result as was reached in the *Phillips* case namely, that the entire operation did not constitute a single establishment but that an operational division or function could constitute an establishment.

In *Walling v. Goldblatt Bros.* (7th Cir. 1945), 152 F. 2d 475, *cert. denied*, 328 U. S. 854, the warehouses again performed a wholesale function, serving a chain store system operating fourteen department stores, a drug store and bakery, and the central offices of the system. *Phillips* was quoted extensively and was the basis of the decision. It should also be noted that the State Street warehouse which principally serviced one of the retail

outlets and was located in proximity to it, was held exempt under Section 13(a)(2).

Four more of the cases cited by Petitioner* involved *Phillips* case situations. In each there was functional separation. The warehouses performed a wholesale function servicing various retail outlets. In each the court ruled that the wholesale function was not a part of the retail function and constituted a separate establishment. As stated above we have no occasion to quarrel with this result.

Mitchell v. E. G. Shinner and Company (7th Cir. 1955), 221 F. 2d 260, involved a company operating 33 retail markets in four states, the Court holding that the central office employees servicing these stores were "engaged in commerce" and that such employees were not exempt as employees of a retail establishment.

Fred Wolferman, Inc. v. Gustafson (8th Cir. 1948), 169 F. 2d 759, is inapplicable for the further reason that considerable emphasis was placed upon the producing or manufacturing type of activity involved as distinguished from the distribution or retail function. The employees were employed by a candy kitchen manufacturing candies and salad dressing which were supplied to several retail stores.

**McComb v. W. E. Wright Co.* (6th Cir. 1948), 168 F. 2d 40, *cert. denied*, 335 U. S. 854.

McComb v. Wyandotte Furniture Co. (8th Cir. 1948), 169 F. 2d 766.

Fletcher v. Grinnell Bros. (6th Cir. 1945), 150 F. 2d 337.

Armstrong Co. v. Walling (1st Cir. 1947), 161 F. 2d 515.

IV.

The Interpretation of the Term "Establishment" Under the Various Unemployment Compensation Statutes Support the Decision Below.

A very similar question concerning the meaning of the term "establishment" is presented under the various state unemployment compensation laws. While the legal question involved is, of course, different, the similarities to the issue in this case are quite clear. Both are humanitarian statutes and the determinations involved are not dissimilar. The analogy is sufficiently close to provide persuasive authority in support of the decision below. Generally these statutes provide that no unemployment compensation is payable to an employee if the reason for his lack of work is a labor dispute at the "establishment" where he works.

While the cases under these statutes reach different results based upon the factual situation involved and place a varying emphasis upon the factors considered, the results persuasively support the correctness of the decision below. There is no case which we have found which warrants the holding contended for here by Petitioner. None holds that a warehouse or other building which is merely part of a business unit or function constitutes an "establishment."

In *Spielmann v. Industrial Commission* (1940), 236 Wis. 240, 295 N. W. 1, the unemployment compensation law did not allow payment of unemployment benefits to an employee if the reason for his lack of work was a labor

dispute at the "establishment" where he worked. The case involved the Nash Company which had two plants 40 miles apart. The operations of the two plants were closely integrated, each performing related functions in the manufacture of automobiles. A single manager was in charge of the two plants. The employees in question were out of work at one of the plants because of a strike at the other plant. The Court summarized its view as follows:

> "It appears from this summary that although the two plants were forty miles apart, they were just as much a single establishment for the manufacture of automobiles as they would have been had they been in two buildings adjacent to each other, or in separate parts of the same building."
>
> *Spielmann v. Industrial Commission,* 236 Wis. at 245, 295 N. W. at 4.

In *Chrysler Corporation v. Smith* (1941), 297 Mich. 438, 298 N. W. 87, a similar result was reached. In this case, a strike at the Dodge main plant caused a lack of work in nine other plants in the Detroit area within a distance of 11 miles of each other. The employees at all of the plants were represented by the same union. It was found that the Company's operations were functionally integrated and synchronized, that the operations of the various plants were controlled from the main plant, that "the central accounting, engineering, export, mailing, production, purchasing, routing and service departments" (297 Mich. at 444, 298 N. W. at 89) were all located in or immediately adjacent to the main plant, although each

plant had individual plant managers and engineers who supervised the immediate operations of their respective plants.

The Court held that under the circumstances all of the plants constituted one establishment.

See also *Mountain States Tel. & Tel. Co. v. Sakrison* (1950), 71 Ariz. 219, 225 P. 2d 707, and *Snook v. International Harvester Co.* (Ky., 1955), 276 S. W. 2d 658.

In *General Motors Corporation v. Mulquin* (1947), 134 Conn. 118, 55 A. 2d 732, the question involved whether two plants located eighteen miles distant from each other constituted a "factory, establishment or other premises." The Court's statements in deciding this question are most relevant:

> ". . . The solution is not to be found merely in its physical isolation from Bristol, a circumstance which, as their memorandum indicates, the commissioners deemed decisive. Geographical separation is important but is by no means controlling. *Where, as here, a manufacturing corporation carries on its business in buildings at different localities, the test is whether they are so operated as to constitute a single unit;* if so, they amount to a single factory. The application of this test requires a consideration of many factors, such as the scheme of management, supervision and production of each plant; . . ."
>
> *General Motors Corporation v. Mulquin,* 134 Conn. at 130, 55 A. 2d at 738.

The foregoing cases therefore all stand for the proposition akin to that enunciated in the *Phillips* case, that the term "establishment" is not necessarily the same as the

entire business entity, with ultimate management or common ownership the criterion, but that separate divisions or separate functions can be separate establishments. Not one of the above cases, nor indeed any case we have found, has held that a separate building comprising only part of an operating unit of the company, without any organizational or employment identity other than its location, constitutes a separate establishment.

All of the cases refer to operating, functional or employment units, or places of business. They refer to customary and usual business practices and to factors which are entirely absent in the instant case. Thus, reference is made to employment, hiring and discharge practices, union representation, record keeping practices, supervisory practices, interchange of employees, seniority, management and operating practices, functional identity, and so on. If a significant number of these practices and functions are common to a particular business unit, that fact has been persuasive in finding such unit to constitute an establishment. We have found no case which has found an establishment to exist where none or only an insignificant few of these factors are applicable. In the instant case not one applies to the Alameda building. On the other hand, substantially all apply to the East Los Angeles Division. The Alameda building is therefore not an establishment within the meaning of Section 13(a)(2). Upon the basis of all the tests, the Division is the smallest unit of the Company with functional identity and which can be termed an "establishment."

V.

There Is No Justiciable Controversy Before the Court, the Case Having Become Moot.

The judgment of the Court of Appeals was entered on March 1, 1956. On April 1, 1956, the collective bargaining agreement between the Teamsters Union and the van and storage industry of Los Angeles and Orange Counties, to which Respondent was a party, expired. This agreement is negotiated on an industry basis. Members of the industry comprise a substantial majority, possibly 85 to 90%, of the van and storage business in this area. Each member individually signs identical substantive contracts. The agreement is negotiated by an industry committee consisting of five members representing some 55 companies. Respondent has only one representative on this committee.

The expired contract did not provide for overtime compensation for work on Saturdays but did for work on Sundays. The main objective of the complaint for injunction below was to require Respondent to pay overtime for work on Saturdays.

Subsequent to April 1, 1956, negotiations were carried on between the industry and the Teamsters Union and a new agreement was signed effective April 1, 1956 (a copy is set forth in the Appendix). The contract is effective until April 1, 1961, a period of five years, with wages, pension plan payments and security fund payments subject to revision upon sixty days' notice prior to April 1, 1959 or April 1, 1960. The employees involved in this action are covered by the agreement.

Among other things, the agreement provides for the payment of time and one-half the regular hourly rate for all work performed after eight hours of work on a

regular work day and on Saturday and Sunday. The agreement therefore satisfies the requirements of the Act; indeed it is more stringent in providing for overtime after eight hours in one day.

We submit that under these circumstances the issue has become moot. The overtime requirements of the Act have been met. As a result the necessary payroll records will be kept.*

We, of course, recognize that mere voluntary cessation of allegedly unlawful conduct does not deprive the Court of power to hear and determine a case. However, the decisions show the law to be that a case becomes moot where alleged violations have ceased and there is no reasonable expectation of future violations.

See:

United States v. W. T. Grant Co. (1953), 345 U. S. 629, 633.

"The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'"

United States v. W. T. Grant Co., 345 U. S. at 633;

United States v. Aluminum Co. of America (2nd Cir. 1945), 148 F. 2d 416, 448.

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*Petitioner states "Because the Company was complying with respect to these office employees at the time suit was instituted, no issue was raised as to their status." (Pet. Br. 23.) Apparently Petitioner, after investigation, was satisfied with the Company's record keeping procedures for employees who are paid overtime after 40 hours per week—as is now true with the employees involved here.

". . . The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption; a 'case or controversy' may remain to be disposed of. * * * To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated."

United States v. Aluminum Co. of America, 148 F. 2d at 448.

In the instant case, since the decision below, Respondent has become party to a new agreement with one of the most powerful unions in the country. This agreement is for a period of five years with a reopening only on wages and pension and security fund payments in the fourth and fifth years. Furthermore, it is not just an agreement between Respondent and the Union but is in effect an agreement between the industry and the Union, the agreement being jointly negotiated and substantively identical for all members of the industry. Changes of this consequence historically and as a practical matter are by industry agreement with the Union. Respondent is not in the position of being alone in the contractual relationship. Furthermore insofar as Respondent is aware, the issue in this action is of interest to it alone among the industry. The industry is a "one-warehouse" industry by and large [R. 109]. The issue here therefore is not of general concern.

It requires, of course, no more than to point out that benefits once gained by a Union even though it is less strong than that involved here, are not readily relinquished.

Under these circumstances, we submit that there can be no reasonable expectation that present overtime provi-

sions of the Union agreement will be reduced below the requirements of the Act. The basis of Petitioner's complaint has therefore been removed.

The signing of a collective bargaining agreement with the bargaining representatives of the employees involved which complied with the Act, has been held to cause a controversy under the Act to become moot:

In *Walling v. Shenandoah-Dives Mining Co.* (10th Cir. 1943), 134 F. 2d 395, the Administrator of the Act, as here, filed an action against the defendant company to enjoin it from violating provisions of the Act. The action was dismissed by the District Court on the ground that the controversy had become moot because a new Union contract which complied with the Act had been entered into six months after the institution of the action. In affirming, the Court said:

> "The question presented is whether, under these circumstances, the administrator is entitled to an injunction as a matter of right when all violations have ceased and there is no reason to assume that the company will violate the Act in the future.
>
> ". . .
>
> ". . . if during the proceedings violations cease and the accused admittedly is in full compliance, without reason to believe that future violations will occur, the justiciable controversy disappears and the question becomes moot. It would seem to be an idle gesture to enjoin violations of the Act when they have ceased and there is no reason to fear that they will again be renewed."
>
> *Walling v. Shenandoah-Dives Mining Co.*, 134 F. 2d at 396, 397-98.

Again in *N. L. R. B. v. Delaware-New Jersey Ferry Co.* (3rd Cir. 1937), 90 F. 2d 520, the Court was petitioned by the National Labor Relations Board to enforce the action of the Board requiring the defendant to bargain collectively with the Union. Thereafter the defendant entered into a contract with the Union. The Court dismissed the petition upon the grounds that the case was moot. The Court stated:

> "The proceeding began with a complaint of unfair practices charged to the respondent. The Board has made its findings sustaining the complaint. Ordinarily nothing would remain to be done except to enforce these findings. The questions sought to be raised have become, however, practically moot. There is now no controversy; no complaint; no grievance. All which is left is the abstract question of the right of a labor union official to negotiate with the respondent employer on behalf of the engineer employees concerned, for a contract of employment. The engineers have disposed of any controversy there may have been by themselves unanimously making a contract on terms acceptable to them with the employer."
>
> *N. L. R. B. v. Delaware-New Jersey Ferry Co.*, 90 F. 2d at 520.

Therefore, under the circumstances, we believe that no justiciable controversy is before the Court, the case having become moot.

Conclusion.

For the foregoing reasons, we urge that the decision of the United States Court of Appeals for the Ninth Circuit and of the District Court are correct and should be affirmed.

Respectfully submitted,

HOMER D. CROTTY,
Attorney for Respondent.

WILLIAM FRENCH SMITH,
WILLARD Z. CARR, JR.,
GIBSON, DUNN & CRUTCHER,
Of Counsel.

Dated: December 20, 1956.

APPENDIX.

Agreement

THIS AGREEMENT is between Bekins Van & Storage Co., hereinafter referred to as the Company, and Local Union No. 389, affiliated with the I.B. of T.C.W. & H. of A., hereinafter referred to as the Union.

WITNESSETH:

ARTICLE I. DESIGNATION OF BARGAINING AGENCY AND JURISDICTION

Section 1: The Company recognizes the Union as the sole and exclusive bargaining agency for all employees within the jurisdiction of the Local Union described as follows: All truck drivers, packers, craters, order fillers, checkers, warehousemen, loaders, helpers and working foremen.

Section 2: Whenever the Company requires new or additional employees for work covered by this Agreement, the Company shall first call upon the Union. The Company may then select between candidates proposed by the Union and candidates obtained from any other source whatsoever and such selection shall be made upon merit and ability and without consideration to membership or non-membership in the Union. All employees covered by this Agreement and all employees subsequently hired must become and remain members of the Union in good standing within thirty-one (31) days of date of hire or date of execution of this Agreement, whichever is later, as a condition of employment.

Section 2-a: Upon notice by the Union, confirmed by letter, of failure on the part of any individual to complete membership in the Union or failure to continue pay-

ment of dues to the Union, the Company shall, within five (5) days, replace such employee. Such replacements shall be employed in accordance with the provisions of this Agreement applying to new employees.

Article II. The Working Day

Section 1: New help without previous experience in the industry here or elsewhere may be employed for a period of thirty (30) calendar days at an apprentice rate of ten (10) cents per hour below the lowest rate for the classification in which hired.

Section 1-a: New help with previous experience in the industry here or elsewhere may be employed at the regular rate for a period of thirty (30) calendar days before becoming regular employees.

Section 1-b: Regular employees shall be those who have been employed for a period of thirty (30) calendar days, and shall be advised in advance when there is no work for them, otherwise they are guaranteed eight (8) hours pay for each day worked, Monday through Friday, and four (4) hours pay for work on Saturday. Notice may be given by bulletin board or through employee phoning dispatcher.

Section 1-c: When regular employees are ordered to report for duty they shall be guaranteed eight (8) hours pay for each day worked, Monday through Friday, and four (4) hours pay for work on Saturday, at rates hereinafter agreed to except in cases of lay-off at the employee's request.

Section 2: Casual labor shall be guaranteed the regular work day of eight (8) hours, providing that if they are dismissed after working a lesser number of hours they shall receive pay at the rate of time and one-half for all

hours worked, and are guaranteed at least two (2) hours pay.

Section 3: All men are to be compensated from the time they start working on any day until discharged from duty at the end of the day, excepting time out for meals. The meal period shall be a maximum of one (1) hour per meal but may be less at the Company's discretion.

Section 4: For regular employees, in addition to their regular hourly rate, the company shall pay or provide transportation from warehouse or other company establishment at which employees are ordered to report to any other place of work during the day and return to starting place. Any exception shall only be by prior mutual agreement between the Union and the Company confirmed subsequently by letter.

Section 5: Any employee who is transferred during the day to work carrying a lower rate of pay shall not have his pay reduced to that of the lower classification.

Section 5-a: When employees are raised during the day from a lower classification to a higher one, payment will be made at the rate applicable for the time worked in each classification, except in instances where helpers are assigned to work in the warehouse to complete their guaranteed day's work.

Section 6: An employee regularly assigned to the warehouse shall be a warehouseman and receive warehouseman's pay as provided in this Agreement.

Section 7: Any employee whose earning capacity is limited because of a physical condition, or any other infirmities, may be employed at a wage scale below that herein provided, subject to prior special agreement with the Union in each case.

Article III. Overtime

Section 1: For all work performed Monday through Friday the employees shall receive the overtime rate of one and one-half (1½) times the regular hourly rate after eight (8) consecutive hours of work, or in any event for hours worked before 7:00 A.M. and/or after 6:00 P.M. on household moves and before 7:00 A.M. and/or after 9:00 P.M. on commercial or office moves.

Section 1-a: For all work performed on Saturday, effective June 1, 1956, the employees shall receive the overtime rate of one and one-half (1½) times the regular hourly rate, subject to a minimum of four(4) consecutive hours of work.

Section 1-b: For all work performed on Sunday the employees shall receive the overtime rate of one and one-half (1½) times the regular hourly rate subject to a minimum of eight (8) consecutive hours of work.

Section 1-c: Any exceptions to Article III shall only be by prior mutual agreement between the Union and the Company, confirmed subsequently by letter.

Article IV. Holidays

Section 1: The following days are agreed upon as regular holidays for all employees covered by this agreement:

New Year's Day	Labor Day
Memorial Day	Thanksgiving Day
Fourth of July	Christmas Day

A regular employee who is on the payroll of the Company for a period of thirty (30) calendar days immediately preceding one of the holidays specified above and who works on the regular work day immediately preceding and following such holiday (unless excused by the Com-

pany) shall be paid for such holiday on the basis of eight (8) hours at the applicable regular rate, if he does not work on such holiday, provided, however, that if the employee is not available for work due to a bona fide illness of not more than thirty (30) days duration, he shall receive such holiday pay. The holiday shall also be paid if it falls in a period when an employee is on vacation.

If employee works on one of the above holidays, he shall be paid the overtime rate of one and one-half (1½) times the regular hourly rate for time worked only on such holiday in addition to holiday pay.

Section 1-a: A regular employee who is laid off or terminated by the Company less than fifteen (15) calendar days prior to a holiday shall be entitled to holiday pay and shall receive pay for that holiday at the time of layoff or termination, except in case of severance of employment, either voluntarily or by discharge for cause.

Article V. Discharge

Section 1: The Company may discharge any employee for cause, such as drinking while on duty, dishonesty, or failure to perform his work in a satisfactory manner.

Article VI. Vacations

Section 1: All employees covered by this Agreement shall be entitled to one (1) week vacation with seven (7) days pay after one (1) year of continuous service. Employees with two (2) years or more of continuous service shall be entitled to two (2) weeks vacation with fourteen (14) days pay. Employees with fifteen (15) years or more of continuous service shall be entitled to seventeen (17) days vacation with pay.

Section 1-a: Vacation pay shall be computed at the employee's regular straight time hourly rate.

Section 1-b: In case of severance of employment either voluntarily or by discharge, except in case of proven dishonesty, employees shall be entitled to pay in lieu of vacation pro-rated as follows: Employees who have worked from one (1) to two (2) years shall receive one twelfth (1/12) of fourteen (14) days pay for each full thirty (30) days over six (6) months since the last anniversary date of employment. Employees who have worked two (2) years or more shall receive two twelfths (2/12) of fourteen (14) days pay for each full thirty (30) days over six (6) months since the last anniversary date of employment. Employees with fifteen (15) years or more shall receive two twelfths (2/12) of seventeen (17) days pay for each full thirty (30) days over six (6) months since the last anniversary date of employment.

Section 1-c: Arranging vacations, the Company may specify periods during which no vacations may be taken on account of rush work. Vacations will be taken as far as possible during slack periods.

Section 1-d: Seniority shall prevail in choice of vacations:

Article VII. Seniority

Section 1: Seniority shall consist of length of continuous service with the Company and such continuity shall not be broken by reason of leaves of absence, bona fide sickness or injury, or layoffs not to exceed one hundred twenty (120) days.

Ability to do the work being equal, the employee with the least seniority shall be the first laid off in the event of the reduction of the working force, and the last employee laid off shall be the first rehired.

Article VIII. Arbitration

Section 1: In the event of any dispute between the Company and the Union as to the meaning or interpretation of any provision of this Agreement, or in the event of any alleged grievance, the parties hereto shall exercise every amicable means to settle or adjust such dispute or grievance; but in the event of failure to accomplish the settlement or adjustment thereof such dispute or grievance shall be referred to a board of three (3) arbitrators, and their majority decision shall be binding upon the parties involved.

The Board of Arbitration shall consist of one (1) representative to be selected by the Company and one (1) representative to be selected by the Union. The representatives so selected shall meet within three (3) days of their appointment and select a third member of the Board, who, when so selected, will act as Chairman.

Upon failure of the representatives so selected to agree upon the Chairman within a further three-day period, both parties agree that the American Arbitration Association or Federal Mediation and Conciliation Service shall be called upon to submit a list of seven (7) names from which, by alternate crossing off, the Chairman shall be selected within ten (10) days.

The Board, when selected, shall meet within a further five-day period at which time both parties shall present their cases, and unless a mutual agreement as to extension of time is agreed upon by both parties, it shall be mandatory upon the Board to render its findings and decision within five (5) days after conclusion of hearings.

Section 1-a: The expense of the Board of Arbitration shall be borne equally by the parties hereto.

Section 1-b: Pending and following final adjustment of any dispute or grievance, there shall be no suspension of work by strike, work stoppage, slowdown, sitdown, or lockout, provided that this restraint of economic action will not be binding upon the Union or the Company if the other party refuses to arbitrate or to be governed by the majority decision of the Arbitration Board.

Section 2: The Union is not in favor of sympathetic strikes and will do everything within its power to prevent them.

Article IX. General Conditions

Section 1: Upon request of the Union on behalf of a member whose time or pay is questioned, the Company agrees to submit the payroll records of such employees for audit by an agent of the Union.

Section 2: No employee shall suffer a reduction in the rate of pay because of signing of this Agreement.

Section 3: Nothing in this Agreement shall in any way be construed as altering, changing or modifying any of the provisions of State or Federal law with respect to the employees concerned hereunder. In the event that State or Federal regulation or legislation shall in any manner conflict with the terms of this Agreement, said conflict shall not alter or change any of the remaining provisions herein, but such regulations or legislation shall become a part of this Agreement.

Article X. Wage Scale

Section 1: The following shall be the minimum of wages paid for local operations:

HOURLY WAGE RATES

	Effective Apr. 1, 1956		Effective Apr. 1, 1957		Effective Apr. 1, 1958	
	Reg. Rate	Overtime Rate	Reg. Rate	Overtime Rate	Reg. Rate	Overtime Rate
All Drivers	$2.15	$3.225	$2.24	$3.36	$2.33	$3.495
Packers	2.15	3.225	2.24	3.36	2.33	3.495
Craters	2.15	3.225	2.24	3.36	2.33	3.495
Order Fillers	2.15	3.225	2.24	3.36	2.33	3.495
Warehousemen	2.15	3.225	2.24	3.36	2.33	3.495
Loaders	2.15	3.225	2.24	3.36	2.33	3.495
Helpers	2.00	3.00	2.09	3.135	2.18	3.27
Working Foreman	2.25	3.375	2.34	3.51	2.43	3.645

Winch truck operators (when operating winch) shall receive an additional fifteen cents (15¢) per hour except when handling household goods.

All salaried employees in the above classification shall receive an equivalent increase to the increases herein provided.

ARTICLE XI. LONG LINE PROVISIONS

Section 1: The following shall be the minimum of wages paid for long line operation.

HOURLY WAGE RATES

	Effective Apri. 1, 1956		Effective Apr. 1, 1957		Effective Apr. 1, 1958	
	Reg. Rate	Overtime Rate	Reg. Rate	Overtime Rate	Reg. Rate	Overtime Rate
Drivers	$2.30	$3.45	$2.39	$3.585	$2.48	$3.72
Driver's Helpers	2.20	3.30	2.29	3.435	2.38	3.57

(a) When a long line driver or helper has worked in excess of sixty (60) hours in any calendar week, he shall be paid at the rate of time and one-half for all work performed in excess of sixty (60) hours.

(b) In addition to the above, the following conditions shall apply to long line hauls only:

(1) It is agreed that any job requiring the driver or crew to be away from home overnight or out of

the city after midnight shall be a long line haul, and work on the job shall be paid for at the rate herein specified.

(2) When two men are used on an operation, one man shall be designated as the driver and shall receive the applicable driver's rate for all time worked. The second man, or helper, shall receive the applicable driver's rate for all time spent driving, and for all other time worked shall receive not less than the applicable helper's rate. If for any reason it becomes necessary during a trip to designate the helper as the man responsible for the operation of the trip, he shall receive the rate applicable to drivers for all time worked.

(c) When drivers and helpers are held away from their home overnight or for their rest period, they shall be compensated on the following basis:

(1) For the first sixteen (16) hours of each layover period, no compensation. For the next eight (8) hours at the applicable regular hourly rate of pay. For the next sixteen (16) hours, no compensation. For the next eight (8) hours, at the applicable regular hourly rate of pay, and continuing on the same basis for each twenty-four (24) hour period of continuing layover, with the exception of layovers falling on Sundays and Holidays.

(2) All drivers and helpers shall be compensated at their regular hourly rate of pay after eight (8) hours of layover time at any shuttle point not located in a city or town with sleeping accommodations.

(3) For any and all subsequent work days of twenty-four (24) hours each, all drivers and helpers shall receive a minimum day's pay of eight (8) hours, or be deadheaded to their home terminal or breaking point.

(4) All deadheading shall be paid for at the regular hourly rate of pay, with a maximum of eight (8) hours deadheading time in any twenty-four (24) hour period. Any unused portion of the work day covered by a minimum of eight (8) hours pay can be used as a portion of the deadheading time.

(5) When a layover falls on Sunday, drivers and helpers shall receive layover pay, in addition to overnight subsistence, as follows:

a. Effective April 1, 1956, five dollars and fifty cents ($5.50).

b. Effective June 1, 1956, six dollars ($6.00).

(6) All drivers and helpers shall be compensated from the time they are ordered to report for duty at home terminal.

(7) The following sum per night for subsistence shall be paid drivers and helpers when they are away from home terminal:

a. Effective April 1, 1956, five dollars and fifty cents ($5.50).

b. Effective June 1, 1956, six dollars ($6.00).

c. Effective April 1, 1957, six dollars and twenty-five cents ($6.25).

d. Effective April 1, 1958, six dollars and fifty cents ($6.50).

Article XII. Security Fund Payments

Section 1: The Moving and Storage industry of Southern California and the Union have established a Trust Fund designated as the Moving and Storage Industry Teamsters Security Fund, for the purpose of providing for the benefit of employees and their dependents insurance benefits for any or all of the following: Life, Accident, Disability and Sickness Insurance, and Medical and Hospital Expenses. Said Trust Fund is administered by a Board of Trustees on which the employees and the employers are equally represented.

Subject to change in the amount of the payment as hereinafter provided, the Company shall pay into said Trust Fund the sum of Eleven Dollars and Five Cents ($11.05) for the month of April, 1956, and commencing May 1, 1956, the sum of Twelve Dollars and Forty-three Cents ($12.43) per month for each regular employee working under this Agreement. Such payments shall include provisions for both employees' and dependents' benefits. Such payments shall be made in addition to all wages and other compensation provided in this Agreement, and such payments shall be made without any deduction for any purpose whatsoever. Such payments shall be due on the first day of the calendar month, and shall be paid not later than the tenth of the same month. The Union and the employees shall have the same rights and remedies in the event of the failure of the Company to make such payments as presently exist with respect to the non-payment of wages. The liability of the Company for the monthly payments herein provided shall be limited to payments on behalf of its own employees.

It is the intention of the Union and the Company that the benefits provided for employees and their dependents by the Moving and Storage Industry Teamsters' Security

Fund as of the effective date of this Agreement shall be maintained until April 1, 1957. Thereafter the amount of the monthly payments shall be the amount determined by the Board of Trustees to be necessary to maintain the same or equal benefits.

A regular employee, with respect to whom such monthly payments are required to be made shall mean:

(a) Any employee on the payroll of the Company on the first day of the calendar month who has been on the payroll of the same Company continuously during the preceding calendar month; or

(b) Any employee on the payroll of the Company on the first day of the calendar month who had been employed by any other Company within thirty (30) days of his date of employment and covered by the Moving and Storage Industry Teamsters' Security Fund.

The Company shall not be required to make such monthly payment for an employee who is absent from work on the first day of the calendar month as a result of illness or accident, whether occupational or otherwise.

Article XIII. Pension Plan Payments

Section 1: The Western Conference of Teamsters Pension Plan has been established to provide certain retirement, termination and death benefits to employees. The Plan and Pension Trust are governed by an equal number of Union and Employer Trustees.

Section 2: The Company agrees that, effective December 1, 1956, and continuing until December 1, 1957, it will pay into the Western Conference of Teamsters Pension Trust Fund for each employee covered by the terms of this Agreement the sum of five cents (5¢) for

each hour for which compensation is paid to him to a maximum of eight dollars and sixty-five cents ($8.65) per calendar month for each such employee, said amounts to be computed monthly.

Section 3: The Company agrees that, effective December 1, 1957, it will pay into the Western Conference of Teamsters Pension Trust Fund for each employee covered by the terms of this Agreement the sum of ten cents (10¢) for each hour for which compensation is paid to him to a maximum of seventeen dollars and thirty cents ($17.30) per calendar month for each such employee, said amounts to be computed monthly.

Section 4: The total amount due for each calendar month shall be remitted in a lump sum not later than ten (10) days after the last business day of such month. The Company agrees to abide by such rules as may be established by the Trustees of said Trust Fund to facilitate the prompt and orderly collection of such amounts, and the accurate reporting and recording of such hours and such amounts paid on account of each member of the bargaining unit. Failure to make all payments herein provided for, within the time specified, shall be a breach of this Agreement.

Article XIV. Term of Agreement

Section 1: This Agreement shall become effective the 1st day of April, 1956, except as otherwise provided herein, and shall remain in effect until April 1, 1961. Wages, Pension Plan payments and Security Fund payments will be subject to revision April 1, 1959, and April 1, 1960, provided either party gives sixty (60) days notice in writing to the other of its desire to modify these conditions prior to April 1, 1959, or April 1, 1960.

Section 2: If agreement upon modification of these conditions has not been reached sixty (60) days after the giving of any such sixty (60) day notice by either party, it shall not be a violation of this Agreement for the Union to take economic action in support of its demands.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,
LOCAL UNION No. 389

By RAY W. FRANKOWSKI

EMPLOYER: Bekins Van & Storage Co.

Date: July 27, 1956

By DANIEL P. BRYANT

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 122

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BEKINS VAN AND STORAGE COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF LABOR

While most of the arguments advanced in respondent's brief are identical to those presented in its brief in opposition to the petition for certiorari, and were, therefore, anticipated and discussed in petitioner's main brief on the merits, respondent makes two contentions not hitherto made directly or explicitly. The *first* is that the case is moot, and the *second* is that the commercial warehousing services of the Alameda warehouse may be "retail" within the meaning of the Section 13 (a) (2) exemption. Both of these contentions are wholly without merit, the second contention, indeed, having been foreclosed by express pre-trial stipulation between the parties.

I

THE CASE IS NOT MOOT

The contention that the case is moot rests upon the same "subsequent developments" (a recently-executed agreement with the union) that respondent relied upon as a reason for its opposition to the petition for certiorari (Respt's Br. in Opp., pp. 7–8). Although in its brief in opposition respondent refrained from asserting explicitly that the union agreement rendered the case moot, it relied on precisely the same facts and arguments for its contention that the case was no longer of sufficient significance to warrant review by this Court (Br. in Opp., pp. 8, 38). This contention was answered in detail in petitioner's reply to the brief of respondent in opposition (pp. 2–10).

We submit that the factual and legal answer presented in that reply establishes that this case is not moot. As there pointed out, even if it be assumed that the effect of the subsequent union agreement would bring respondent into substantial compliance with the Act,[1] it is settled beyond doubt that the discontinuance of violations by voluntary agreement (*Walling* v. *Helmerich & Payne*, 323 U. S. 37), or by completion of the work involved in the particular litigation (*Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427), or by dissolution of the corporate employer (*Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671; *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S.

[1] The reasons for questioning the adequacy of the union agreement to effectuate compliance with the requirements of the Act are set forth in petitioner's reply to the brief for respondent in opposition, pp. 6–10.

945) does not moot the controversy. See also *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261. As also pointed out in our reply (pp. 4–5), such subsequent developments particularly do not moot a case like the instant one where there is a "public interest in having the legality of the practices settled" (*United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632), and a ruling of mootness would frustrate the Government's right of "pursuit to completion of the prescribed appellate procedure" (*Reuter*, 321 U. S. at 676).

Respondent's reliance upon *United States* v. *W. T. Grant Co. supra*, is plainly misplaced. Not only did that decision explicitly hold that "the actions [there involved] *were not moot*" (345 U. S. at 635, emphasis added), but the following summary of the principles and authorities is directly applicable to the instant case (345 U. S. at 632):

> * * * [The] voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i. e., does not make the case moot. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37 (1944); *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944). A controversy may remain to be settled in such circumstances. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (1945), e. g., a dispute over the legality of the challenged practices. *Walling* v. *Helmerich & Payne, Inc., supra; Carpenters Union*

> v. *Labor Board,* 341 U. S. 707, 715 (1951). The defendant is free to return to his old ways. This, *together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.* * * * [345 U. S. at 632, emphasis added].

The holding of the *W. T. Grant* decision was that *"although the actions were not moot,* no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief" (345 U. S. at 635–636, emphasis added). The instant case, unlike *W. T. Grant,* does not present the question of the trial court's discretion to grant or deny relief. Respondent here clearly had not discontinued the challenged conduct at the time of the trial court's decision, and the question of the exercise of discretion to grant relief was neither presented nor decided in that court. Moreover, in significant contrast to the *W. T. Grant* case, the decision below decided, on its merits, the controversy between the parties over the legality of the challenged conduct—conduct which respondent still vehemently contends is legal (Respt's. Br., pp. 12–45). In these circumstances, there remains a justiciable controversy requiring "pursuit to completion of the prescribed appellate procedure" (*Reuter, supra*), particularly since there is a substantial "public interest in having the legality of the practices settled" (*W. T. Grant, supra*) and in correcting an erroneous lower court decision upon which, otherwise, respondent and others may rely in the future. See *Walling* v. *Helmerich & Payne,* 323 U. S. 37, 43; *Walling* v. *Mutual Wholesale Food*

& Supply Co., 141 F. 2d 331, 335 (C. A. 8); *Walling* v. *Haile Gold Mines*, 136 F. 2d 102, 105 (C. A. 4).

None of the other decisions on which respondent relies (pp. 47–50) affords any support for its contention of mootness. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. A. 2), indeed, supports the opposite conclusion, citing "plentiful authorities" for its ruling that the cessation of the conduct there challenged did *not* moot the controversy (at 448). In *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. 2d 395 (C. A. 10), as in the *W. T. Grant* case, the decision related solely to the discretion of the trial court to grant or deny relief where it was conceded that the challenged conduct had ceased prior to the trial court's decision and that there was no reason to doubt compliance with the law in the future. In addition, that decision was rendered almost two years prior to this Court's decision in *Walling* v. *Helmerich & Payne, supra*, and a year before the Tenth Circuit's holding in *Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308, which in effect repudiated any possible implications of mootness there might have been in the *Shenandoah-Dives* decision. In *Helmerich & Payne*, this Court held that the voluntary cancellation of challenged employment contracts and the substitution of contracts which were concededly legal did not moot the case, where the decision below was "on the merits" and respondent had "consistently urged the validity of" its past conduct (323 U. S. at 43).

Respondent's reliance on *N. L. R. B.* v. *Delaware-New Jersey Ferry Co.*, 90 F. 2d 520 (C. A. 3), certio-

rari denied, 302 U. S. 738, overlooks that opinion's plain inconsistency with the long line of *subsequent* decisions of this Court and of the Courts of Appeals, which have regularly held that voluntary compliance, changes in circumstances, and settlement by contract or otherwise, do not moot orders of the Labor Board. *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *Carpenters Union* v. *N. L. R. B.*, 341 U. S. 707, 715; *N. L. R. B.* v. *Mexia Textile Mills*, 339 U. S. 563, 567; *N. L. R. B.* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225, n. 7 rehearing denied, 337 U. S. 950; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 230; *N. L. R. B.* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947 (C. A. 2); *N. L. R. B.* v. *Bell Aircraft Corp.*, 206 F. 2d 235, 238 (C. A. 2); *N. L. R. B.* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1007 (C. A. 3); *N. L. R. B.* v. *Taormina*, 207 F. 2d 251, 255 (C. A. 5); *N. L. R. B.* v. *C. C. Lang & Son, Inc.*, 212 F. 2d 436 (C. A. 6); *N. L. R. B.* v. *Trimfit of California*, 211 F. 2d 206, 208 (C. A. 9); 144 A. L. R. 460–462.

II

THE COMMERCIAL WAREHOUSING SERVICES OF THE ALAMEDA WAREHOUSE ARE NOT "RETAIL" UNDER SECTION 13 (a) (2)

Respondent, in the "Preliminary Statement" of its Argument, asserts that most of its warehouses, and not Alameda alone, "regularly engage in handling commercial goods" (p. 13) and that, therefore, Alameda is no less a "retail establishment" because of the commercial nature of its warehousing than are the other warehouses. To support this assertion,

respondent contends (p. 14) that commercial warehousing services, as well as non-commercial warehousing, "can be retail" under the amended Section 13 (a) (2). This contention, which seems to imply that Alameda, even if regarded as a separate establishment, might qualify for the exemption, is directly in conflict with the undisputed, and expressly stipulated fact, that the "percentage tests" of the exemption "are *not* met in the case of Alameda if Alameda alone is a single 'establishment' within the meaning of Section 13 (a) (2) * * *" (Stip. XII, R. 18, emphasis added). On the basis of this pre-trial stipulation, which was made a part of the record (R. 139), the trial court found that "Such tests [including specifically the test that 75 per cent of its sales of services must be "not for resale and * * * recognized as retail * * * in the particular industry"] are not met in the case of the Alameda warehouse considered separately" (Fdg. 2, R. 34).

The plain import of this stipulation and finding is that, admittedly, more than 25 percent of the annual dollar volume of services at Alameda is *not* retail; this made it unnecessary to adduce evidence on the question whether or not the commercial storage services at Alameda are "recognized as retail" in the warehousing industry. As respondent undoubtedly was and is well aware, any contest on that point, which it now seeks to raise, would have entailed extensive and burdensome proof, as well as a thorough presentation and consideration of the voluminous legislative history on the 1949 amendments to the exemption. It was deliberately decided by the parties to

foreclose a contest on this issue by the pre-trial stipulation, the evident basic premise of which was that the commercial warehousing at Alameda was *not* retail within the meaning of the amended exemption.

Although the record does not disclose in detail the precise nature of Alameda's non-retail functions (since the stipulation made such evidence unnecessary), the record, as well as the stipulation, refutes respondent's suggestion that the nature of Alameda's functions is no different from, and no less retail than, the functions at respondent's other warehouses. The record shows that, unlike many of respondent's other warehouses which are located in residential areas serving essentially household storage needs, the character of Alameda's business is determined by its location in an area which "consists entirely of an industrial and commercial neighborhood" (Fdg. 16, R. 41). The record also shows that Alameda engages substantially in the general "storage of commercial goods" such as "phonographs and radios and washing machines, and things like that" for the business concerns located in its environs which consists "entirely of * * * heavy industrial and commercial" enterprises (Stip. R. 18, Fdg. 16, R. 41, 129). That this type of storage warehousing is not only non-retail but is in the category of functions performed by the "independent wholesaler or middle man" is confirmed by the standard references on the warehousing business. Warehousing of commercial goods is known in the trade as warehousing of "general merchandise," as distinguished from "household goods and furniture." See Frederick, *Public Warehousing,* pp. 15–16. "General

merchandise warehouses" are defined as those used "for *the storage of merchandise and commodities by manufacturers or other shippers until the goods are required by retailers, distributors, or industrial and household consumers.* * * * General merchandise warehouses are frequently referred to as distribution warehouses. *They really act as service links between the producer and consumer." Ibid.* (Emphasis added.)

Obviously, the fact that respondent's admittedly exempt warehouses may also engage, to some extent, in such non-retail commercial storage in no way affects the non-exempt status of Alameda, since Section 13 (a) (2) by its express terms makes the exemption depend upon the proportionate *percentages* of the retail and non-retail services of the particular establishment.

In these circumstances, we believe it would serve only to burden the Court unnecessarily if we should undertake a full answer to respondent's cryptic contention that commercial warehousing, as well as non-commercial warehousing, "*can* be retail" (emphasis added). Not only are the isolated excerpts which respondent quotes from the legislative history (pp. 14-15) taken out of the context of other pertinent and lengthy legislative comment and debate, but the statutory language itself, as well as the very excerpts quoted by respondent, make it evident that commercial services could not be found to be "retail" in the absence of proof that such services are "recognized as retail * * * in the particular industry" (Section 13 (a) (2)). This is the very proof which

respondent waived by the pre-trial stipulation, in apparent recognition that it had the burden of proving the application of the exemption. Respondent's suggestion at this stage that it might be able to prove that Alameda's commercial warehousing is "recognized as retail" is patently inappropriate, and serves only to confuse and obscure the sole issue before the Court, *i. e.*, whether Alameda is a separate "establishment" within the meaning of the exemption.

Respectfully submitted.

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FEBRUARY 1957.

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Decisions Per Curiam.

No. 122. MITCHELL, SECRETARY OF LABOR, *v.* BEKINS VAN & STORAGE CO. Certiorari, 352 U. S. 819, to the United States Court of Appeals for the Ninth Circuit. Argued February 26–27, 1957. Decided March 11, 1957. *Per Curiam:* The judgment is reversed. Respondent's five physically separate warehouses do not constitute a single "retail establishment" within the meaning of the exemption provided by § 13 (a)(2) of the Fair Labor Standards Act, 52 Stat. 1067, as amended, 63 Stat. 917, 29 U. S. C. § 213 (a)(2). *Phillips, Inc.*, v. *Walling*, 324 U. S. 490; see 95 Cong. Rec. 12579. MR. JUSTICE BURTON and MR. JUSTICE HARLAN, believing that the decision of the Court of Appeals was based upon proper standards and sufficient evidence, would affirm the judgment. *Bessie Margolin* argued the cause for petitioner. With her on the brief were *Solicitor General Rankin, Stuart Rothman* and *Eugene R. Jackson*. *William French Smith* argued the cause for respondent. With him on the brief was *Homer D. Crotty*. Reported below: 231 F. 2d 25.